(14)

No. 99-1994-CFX Title: Nevada, et al., Petitioners
v.
Floyd Hicks, et al.

Docketed: June 12, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jun 5 2000	Petition for writ of certiorari filed. (Response due July 12, 2000)
	Jul 12 2000	Brief of respondents Tribal Court In & For Fallon Paiute Shoshone Tribes, et al. in opposition filed.
	Jul 12 2000	Waiver of right of respondent Floyd Hicks to respond filed.
	Jul 26 2000	DISTRIBUTED for Conference of September 25, 2000
	Oct 2 2000	REDISTRIBUTED for Conference of October 6, 2000
	Oct 10 2000	Petition GRANTED. SET FOR ARGUMENT March 21, 2001. **********
	Nov 17 2000	Order extending time to file petitioners' brief on the merits to and including November 30, 2000.
	Nov 30 2000	Joint appendix filed.
	Nov 30 2000	Brief of petitioners Nevada, et al., filed.
	Nov 30 2000	Brief amici curiae of Montana, et al. filed.
	Dec 15 2000	Order extending time for filing respondents' briefs on the merits to and including January 19, 2001.
	Jan 9 2001	Brief amicus curiae of United States filed.
	Jan 19 2001	Brief of respondent Floyd Hicks filed.
	Jan 19 2001	Brief amici curiae of Confederated Tribes of Colville Reservation, et al. filed.
	Jan 19 2001	Brief amicus curiae of Coalition for Local Sovereignty filed.
	Jan 19 2001	Brief of respondents Tribal Court In and For Fallon Paiute-Shoshone Tribes, et al filed.
	Jan 19 2001	Brief amici curiae of Thlopthlocco Tribal Town and the Sac and Fox nation filed.
	Jan 19 2001	Brief amici curiae of Pyramid Lake Paiute Tribe of Nevada, et al. filed.
	Jan 30 2001	CIRCULATED.
	Feb 5 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 20 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Feb 23 2001	Reply brief of petitioners Nevada, et al. filed.
	Mar 6 2001	Record filed.
	Mar 6 2001	Record filed.
	Mar 21 2001	ARGUED.

1pp

Supreme Court, U.S.
FILED

99 1994 JUN 5 - 2000

OFFICE OF THE CLERK

No.....

IN THE

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,

Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

C. WAYNE HOWLE*
Senior Deputy Attorney General

100 N. Carson Street
Carson City, Nevada 89701-4717
(775) 684-1227

Counsel for Petitioners
*Counsel of Record

149 pp

QUESTIONS PRESENTED

(1) Does either the sovereign immunity of the State of Nevada, or the qualified immunity of its officers, preclude tribal court jurisdiction in actions stating tort and constitutional claims against individually-named state officials, for official actions taken in Indian country with express permission of a tribal judge?

(2) Is decision on the question of tribal court jurisdiction over state officials properly bifurcated, with consideration of the tribal court's jurisdiction separated from, and antecedent to, decision on the officials' claims of sovereign and qualified immunity?

(3) Is the rule of *Montana v. United States*, 450 U.S. 544 (1981), creating a presumption against tribal court jurisdiction over non-members, limited to cases in which a cause of action against a non-member arises on lands within a reservation which are not controlled by the tribe?

TABLE OF CONTENTS

Page(s)

Opinions Below 2

Jurisdiction 2

Statement of the Case 2

Reasons for Granting the Petition 5

I. The Ninth Circuit Court of Appeals has Decided Important Federal Questions About Federalism, States, And Tribes In A Manner That Conflicts With Relevant Decisions Of This Court, And Which In Any Event Should Be Resolved By This Court Due To Their Significance 6

A. The Supreme Court Should Examine The Ninth Circuit's Treatment Of State Sovereignty, And Define The Effect Of State Immunity On Tribal Jurisdiction 6

1. Sovereign Immunity 6

2. Individual Capacity And Individual Defenses 10

B. The Supreme Court Should Examine The Ninth Circuit's Expansive Definition Of Tribal Sovereignty And Adjudicative Jurisdiction 14

C. The Circuit Has Misapplied The Tribal Exhaustion Rule By Separating The Questions Of Tribal Court Jurisdiction And State Immunity 18

1. Immunity Defenses Are Factors Relevant To The Jurisdictional Determination 18

TABLE OF CONTENTS, continued

Page(s)

2. The Circuit's Newly-Created Exhaustion Requirement For Immunity Conflicts With The Law Of Another Circuit 23

II. The Ninth Circuit Court Of Appeals Has Entered A Decision In Conflict With The Decision Of Another Circuit On The Effect To Be Given The Rule In *Montana v. U.S.*, 450 U.S. 544 (1981) 24

Conclusion 27

Appendix A (Ninth Circuit Opinion, November 9, 1999, amended January 24, 2000) A-1

Appendix B (United States District Court Opinion, October 1, 1996) B-1

Appendix C (Nevada Inter-Tribal Court of Appeals, Opinion, May 13, 1994) C-1

Appendix D (Ninth Circuit Order, March 9, 2000) D-1

Appendix E (Affidavit of Mike Spencer, August 30, 1990) E-1

Appendix F (Fallon Paiute-Shoshone Tribal Court Order Approving and Authorizing Execution of Search Warrant on Tribal Reservation, June 13, 1991 [attachment #1, Justice Court, New River Township, Case No. 91-01248, Search & Seizure Warrant, June 12, 1991; attachment #2, Affidavit of Mike Spencer, June 12, 1991]) F-1

TABLE OF CONTENTS, continued

Page(s)

Appendix G (Justice Court, New River Township, Search Warrant, August 30, 1990) G-1

Appendix H (Complaint filed in Fallon Paiute-Shoshone Tribal Court, July 8, 1991) H-1

Appendix I (Amended Complaint filed in Fallon Paiute-Shoshone Tribal Court, June 1, 1994) I-1

Appendix J (Motion to Quash Service of Process, filed in Fallon Paiute-Shoshone Tribal Court, July 18, 1991) J-1

Appendix K (Supplement Points and Authorities in Support of Motion to Quash Service of Process filed in Fallon Paiute-Shoshone Tribal Court, January 21, 1992) K-1

Appendix L (Fallon Paiute-Shoshone Tribal Court Order Quashing Service of Process as to Specially Appearing State Defendants) L-1

TABLE OF AUTHORITIES

Cases **Page(s)**

A-1 Contractors v. Strate,
76 F.3d 930 (8th Cir. 1996) 25

Alden v. Maine,
527 U.S. 706 (1999) 7, 8, 11

Arizona Public Service Co. v. Aspaas,
69 F.3d 1026 (9th Cir. 1995) 22

Ashker v. California Dept. of Corrections,
112 F.3d 392 (9th Cir. 1997) 14

Atkinson Trading Co., Inc. v. Shirley,
No. 98-2247, 2000 U.S. Appeal LEXIS 8609
(10th Cir. 2000) 26

Bailey v. Board of Cty. Commrs. of Alachua Cty.,
956 F.2d 1112 (11th Cir. 1992) 13

Blatchford v. Native Village of Noatak,
501 U.S. 775 (1991) 7, 17

Burlington Northern Railroad Co. v. Estate of Red Wolf, 522 U.S. 801 (1997) 16

Calderon v. Ashmus,
523 U.S. 740 (1998) 21

Cameron v. Bay Mills Indian Community,
843 F. Supp. 334 (W.D. Mich. 1994) 12, 23

TABLE OF AUTHORITIES, continued

Cases **Page(s)**

Chemehuevi Indian Tribe v. California St. Bd. of Equalization, 757 F.2d 1047, 1051 (9th Cir.) *rev'd in part on other grounds*, 474 U.S. 9 (1985) 22

Chisholm v. Georgia, 2 Dall. 419 (1792) 7

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 691 (1999) 21

County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) 16

Dixon v. Richer, 922 F2d 1456 (10th Cir. 1991) 13

Duro v. Reina, 496 U.S. 676 (1990) 10, 16

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 15, 25

Erwin v. Daley, 92 F.3d 521 (7th Cir. 1996) 13

Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) 17

Ex Parte Young, 209 U.S. 123 (1908) 7, 8, 18

TABLE OF AUTHORITIES, continued

Cases **Page(s)**

FMC v. Shoshone-Bannock Tribes,
905 F.2d 1311 (9th Cir. 1990) 27

Gregory v. Ashcroft,
501 U.S. 452 (1991) 9

Hafer v. Melo,
502 U.S. 21 (1991) 7, 14

Hagen v. Sisseton-Wahpeton Community College,
205 F.3d 1040 (8th Cir. 2000) 22

Hans v. Louisiana,
134 U.S. 1 (1890) 7, 9

Hardin v. White Mountain Apache Tribe,
779 F.2d 476 (9th Cir. 1985) 12, 22

Hunter v. Bryant,
502 U.S. 224 (1991) 13

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997) 17, 21

Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269
(9th Cir. 1991) 22

In re Ayers,
123 U.S. 443 (1887) 22

TABLE OF AUTHORITIES, continued

Cases **Page(s)**

Iowa Mut. Ins. Co. v. LaPlante,
480 U.S. 9 (1987) 9, 23, 24

ITSI TV Productions, Inc., v. Agricultural Associations, 3 F.3d 1289 (9th Cir. 1993) 19

Jones v. Meehan,
175 U.S. 1 (1899) 15

Kimel v. Florida Board of Regents,
120 S. Ct. 631 (2000) 7, 21

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) 21

Marx v. Government of Guam,
866 F.2d 294 (9th Cir. 1989) 21

McClendon v. United States,
885 F.2d 627 (9th Cir. 1989) 21

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982) 15, 26

Miller v. Coyhis,
877 F. Supp. 1261 (E.D. Wis. 1995) 12

Monroe v. Pape,
365 U.S. 167 (1961) 8, 11

Montana v. United States,
450 U.S. 544 (1981) 6, 15, 24, 25, 26

TABLE OF AUTHORITIES, continued

Cases **Page(s)**

National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)..... 15, 16, 17, 23, 24

Nevada v. Hall, 440 U.S. 410 (1979)..... 8

New York v. United States, 505 U.S. 144 (1992)..... 17

Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority, 207 F.3d 21 (1st Cir. 2000)..... 23

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)..... 10, 16

Pan American Company v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989)..... 21

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982)..... 11, 19, 20

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)..... 20

Printz v. U.S., 521 U.S. 898 (1997)..... 9, 10

Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc., 506 U.S. 139 (1993)..... 22

TABLE OF AUTHORITIES, continued

Cases **Page(s)**

Roff v. Burney,
168 U.S. 218 (1897) 15

Romanella v. Hayward,
933 F. Supp. 163 (D. Conn. 1996) 12

Salas v. Carpenter,
980 F.2d 299 (5th Cir. 1992) 13

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1977) 15

Scott v. Clay County,
205 F.3d 867 (6th Cir. 2000) 13

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 7, 9, 17, 20

South Dakota v. Bourland,
508 U.S. 679 (1993) 25, 26

Strate v. A-1Contractors,
520 U.S. 438 (1997) 16, 17, 26

Suarez v. Newquist,
855 P.2d 1200 (Wash. App. 1993) 12

United States v. Quiver,
241 U.S. 602 (1916) 15

United States v. Wheeler,
435 U.S. 313 (1978) 17

TABLE OF AUTHORITIES, continued

Cases **Page(s)**

Wegener v. City of Covington,
933 F.2d 390 (6th Cir. 1991) 13

Williams v. Lee,
358 U.S. 217 (1959) 15, 24, 25

Wyatt v. Cole,
504 U.S. 158 (1992) 11

Constitutional and Statutory Provisions

25 U.S.C. §§ 1301-1341 3
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 2
28 U.S.C.A. § 1331 2
42 U.S.C. § 1983 ..... 4, 11

Other Authorities

Civil Rights Action: § 1983 and Related Statutes II,
Peter W. Low and John C. Jeffries, Jr.
(2d ed. 1994) 11

In Praise of the Eleventh Amendment and Section 1983,
John C. Jeffries, Jr.
84 Virginia L. Rev. 47, 59 (1998) 8, 11

TABLE OF AUTHORITIES, continued

Other Authorities **Page(s)**

Must Courts Raise the Eleventh Amendment Sua Sponte?: The Jurisdictional Difficulty of State Sovereign Immunity,
F. Ryan Keith
56 Wash. & Lee L. Rev. 1037, 1050 (1999) 20

Tribal Self-Determination Unfettered: Toward a Rule of Absolute Tribal Official Immunity from Damages in Federal Court,
Timothy W. Joranko
26 Ariz. St. L. J. 987, 1009-1017 (1994) 12

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NEVADA; WILLIAM MOLINI;
RICH ELLINGTON; MICHAEL SPENCER;
BILL FITZMORRIS,
Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN
AND FOR THE FALLON PAIUTE-SHOSHONE
TRIBES; JOSEPH VAN WALRAVEN, HON.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners State of Nevada, William Molini, Rich Ellington, Michael Spencer, and Bill Fitzmorris (collectively the "State"), respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit, review of which is sought by this petition, is reported at 196 F.3d 1020 (9th Cir. 1999), as amended January 24, 2000, and is reproduced in the appendix hereto ("App.") at A-1 to A-23. The opinion of the District Court for the District of Nevada, entered on October 1, 1996, is reported at 944 F. Supp. 1455 (D. Nev. 1996), and is reproduced at App. B-1 to B-24.

Additionally, the final decision of the Nevada Intertribal Court of Appeals, dated May 13, 1994, is attached at App. C-1 to C-8.

JURISDICTION

The opinion of the Ninth Circuit was entered on November 9, 1999. The State's petition for rehearing and suggestion for rehearing en banc were denied by order dated March 9, 2000. App. D-1.

In the federal district court, the jurisdictional basis for challenging tribal court jurisdiction over state officials was federal question jurisdiction. 28 U.S.C.A. § 1331. Jurisdiction of the Ninth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The decision of the Ninth Circuit in this case holds, for the first time, that tribal courts may exercise jurisdiction in civil actions filed against state officials. The following facts give rise to this exceptional decision.

This case began with official actions taken by Nevada game wardens in 1990 and 1991, on the Fallon Paiute-Shoshone Reservation (the "Reservation"), located sixty miles east of Reno, and wholly within Nevada. The Reservation was established by authority of the Act of April 30, 1908, 35 Stat. 85, and subsequent enactments, and no treaties pertain to its existence.

Significantly, the actions of the game wardens were approved by a tribal judge. On two occasions separated by a year's time, one or more wardens seized different mounted bighorn sheep's heads from the on-reservation residence of tribal member Floyd Hicks. The wardens believed the property to be evidence of off-reservation poaching of bighorn sheep, in violation of state law. Before seizing the heads, warden Michael Spencer swore out search warrants, *see* Affidavits of Michael Spencer, App. E-1 to E-2 and F-3 to F-4, in a state justice court, then obtained approval from a tribal judge for execution of the warrants on the reservation. *See* App. at F-1 and G-1 (search warrants approved by Tribal Judge Rebecca Harold). The wardens also obtained accompaniment to the Hicks residence from tribal police officers. In each case, the seized property proved not to be evidence of crime, and was returned. Subsequently Floyd Hicks sued Warden Spencer in two separate actions, and named two other wardens and the administrator[1] of the Nevada Division of Wildlife (NDOW) in one of them.[2] The suits were brought in the same tribal court that had approved the warrants. Hicks named the State of Nevada as well as the officials in both their individual and official capacities. His complaints alleged that the wardens had not followed tribal code provisions pertaining to search and seizure. The original claims sounded in tribal and common law tort, and also purported to rely on the Indian Civil Rights Act, 25 U.S.C. §§ 1301 to 1341. App. at H-1 to H-17.[3] Mr. Hicks amended the

---

[1] Even though he is named, no allegations have ever been made in any forum that Administrator (formerly Director) William A. Molini (now retired) participated in any of the actions complained of by Mr. Hicks.

[2] He also named the tribal judge who approved the warrants, and the tribal police who accompanied the state officers.

[3] For brevity's sake, only the complaint in CV-FT-91-034 is reproduced in the appendices. The complaint in CV-FT-92-031 is substantially similar. Subsequent proceedings treated the two cases as though consolidated.

complaints several times, and following Nevada's initiation of federal court action, dropped the State and official capacity defendants. The claims were also repeatedly amended, so that currently they sound in common law tort and federal civil rights law (i.e. 42 U.S.C. § 1983). App. at I-1 to I-5.

Before seeking relief in federal court, Nevada and its officials litigated the tribe's jurisdiction for almost three years in tribal court. From the inception, on motions to quash, the officials raised the State's and their own individual immunities as bars to the tribal court's jurisdiction. *See e.g.* App. at J-1 to J-7, Motion to Quash, and App. at K-1 to K-13, State's Supplemental Brief.

Twice the tribal trial court dismissed the actions, but ultimately the tribal appellate court reversed. The tribal court held that principles of state sovereign immunity and the individual defendants' qualified immunity did not prevent the tribal court from exercising jurisdiction over the state defendants, App. at L-1, and a three-judge appellate panel reiterated this holding. App. at C-4 to C-5.

At this juncture, the State filed an action in the Federal District Court for the District of Nevada, seeking declaratory and injunctive relief against the tribal court and Floyd Hicks. The State argued, as it had in tribal court, that the status of state officials precluded tribal court jurisdiction over them. The court denied the State its relief, determining dismissively that "the status of the state defendants as state actors [does not] argue persuasively against jurisdiction," 944 F. Supp. at 1468, (App. at B-15) and concluding:

> Plaintiffs have failed to prove the jurisdiction asserted by the tribe is affirmatively limited by federal law. No express congressional divestment of the tribe's presumed inherent jurisdiction, or "an overriding federal interest that would necessarily be frustrated" by the exercise of tribal jurisdiction, has been shown. Therefore, this court concludes that the Fallon Tribal

> Court has jurisdiction to adjudicate Hicks' claims against the state defendants in their individual capacities.

Id. (App. at B-15 to B-16) (citations omitted).

The State appealed to the Ninth Circuit on October 29, 1996. On October 7, 1997, the case was argued and submitted. Three days later, the case was withdrawn from submission. For two years thereafter, the case languished, being resubmitted on November 4, 1999, and decided on November 9, 1999.

In its decision affirming the lower court, the Ninth Circuit concluded that the State had exhausted its remedies on the issue of tribal court jurisdiction, thus making it "ripe for federal review. We conclude that the tribal court has subject matter jurisdiction over the claims brought by Hicks against the state officials." 196 F.3d at 1029 (App. at A-12).

The Circuit also ruled that the immunity questions were not exhausted in tribal court and therefore were not properly before the district court or the appeals court. *Id.* (App. at A-3).

REASONS FOR GRANTING THE PETITION

The State urgently suggests that its petition be granted for two reasons. First, the decision whose review is sought presents to this Court for direct review, for the first time, the question of tribal civil adjudicative jurisdiction over state officials. In deciding this case, the Ninth Circuit creates new federal law, which implicates fundamental federalism principles. It does this by elevating tribal courts to a new, constitutional status not warranted by the text or history of the Constitution; and it achieves this result by diminishing state sovereignty in a manner also unjustified by a faithful reading of the Constitution and decisions of this Court, which construe it. In addition, the decision sets out an onerous procedure for federal court review of claims of state immunity in tribal

court. Ultimately, all of these issues are peculiarly within the province of this Court to evaluate and decide.

The second reason for granting the petition is to reconcile inconsistent circuit court decisions addressing the import of this Court's opinions in *Montana v. United States,* 450 U.S. 544 (1981), and subsequent cases.

I. THE NINTH CIRCUIT COURT OF APPEALS HAS DECIDED IMPORTANT FEDERAL QUESTIONS ABOUT FEDERALISM, STATES, AND TRIBES IN A MANNER THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, AND WHICH IN ANY EVENT SHOULD BE RESOLVED BY THIS COURT DUE TO THEIR SIGNIFICANCE.

Both the federal district court and the Ninth Circuit decided the issue of the tribal court's jurisdiction as if the state officials were run-of-the-mill tort feasors. Virtually all analysis was committed to the subject of tribal sovereignty, and none to the aspects of state sovereignty which were equally present and affected. In their disregard for the status of the state officials, the courts have set the law upon a new and misbegotten course.

A. THE SUPREME COURT SHOULD EXAMINE THE NINTH CIRCUIT'S TREATMENT OF STATE SOVEREIGNTY, AND DEFINE THE EFFECT OF STATE IMMUNITY ON TRIBAL JURISDICTION.

1. Sovereign immunity.

The Circuit's holding in this case is that tribal courts have jurisdiction to hear actions against state officials. This holding recognizes no distinction among the tort claims, tribal claims, and federal civil rights claims attempted against the state officials. In so deciding, the Circuit necessarily determined that state sovereign immunity is not a jurisdictional bar in the tribal forum as to any claim. This is a remarkable holding in two regards, both of which deserve this Court's review. First, as addressed in this section, the decision imparts

new, limiting definition to state sovereignty. The obverse of this holding--a new, expansive definition imparted to tribal sovereignty--is the second reason for review by this Court, and will be discussed hereafter in Part I.B.

In this cause, the State of Nevada brings an example of the "anomalous and unheard-of proceedings or suits" against states which this Court disparaged in *Alden v. Maine*, 527 U.S. 706, 727 (1999), *quoting from Hans v. Louisiana*, 134 U.S. 1, 18 (1890). The Ninth Circuit's holding--that a tribal court may have jurisdiction over state officials for actions taken in their official capacities--is directly at odds with 'history and experience, and the established order of things," *id.*, which define state immunity. Only this Court may determine whether the Ninth Circuit's view is the correct one.

This Court has dealt over the years with the issue of states' susceptibility to suit in different circumstances. The law has developed along several branches.

Suit against states qua states in federal courts has been addressed in a continually developing line of decision, beginning with the vintage opinions in *Chisholm v. Georgia*, 2 Dall. 419 (1792) and *Hans v. Louisiana*, 134 U.S. 1 (1890), through to such recent decisions as *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), and *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), to cite but a few.

To avoid the general bar against federal citizen suits naming states as defendants, the Court has developed a doctrine to permit suit against state officials when the officials allegedly act in violation of federal law. This branch of decision is well-known as the *Ex Parte Young* doctrine, after the decision in *Ex Parte Young*, 209 U.S. 123 (1908).

Yet another branch of decision, an apparent extension of the *Ex Parte Young* doctrine, *see Hafer v. Melo*, 502 U.S. 21, 30-31 (1991), recognizes federal court jurisdiction to hear damages claims against individually-named state officials who

allegedly violate individuals' civil rights. This doctrine, embodied in *Monroe v. Pape,* 365 U.S. 167 (1961), has been referred to as "the *Ex Parte Young* of retrospective relief." John C. Jeffries, Jr., "In Praise of the Eleventh Amendment and Section 1983," 84 Virginia L. Rev. 47, 59 (1998).

Finally, suit against a state in another state's courts was addressed in *Nevada v. Hall*, 440 U.S. 410 (1979), and suit against states in state courts, pursuant to Congressional mandate, was reached recently in *Alden v. Maine*, 527 U.S. 706 (1999).

Thus in all instances in which the sovereignty of states has been interposed to defeat a court's claim of jurisdiction, this Court has taken up the issue.

This case presents yet another challenge to states' sovereignty, this time in a tribe's courts. The Court again should accept and hear the case, even if the issue presented is daunting. *Cf. Ex Parte Young,* 209 U.S. at 143.

The conundrum in the instant matter is whether the immunity of a state, within its own legal borders, is susceptible to breach by the courts of another sovereign, whose role--if there is one--in "our federalism," *Alden v. Maine*, 527 U.S. 706, 748 (1999), is extra-constitutional. The Ninth Circuit in this matter answered this question in the affirmative. Respondents will add that the effect of immunity awaits decision at trial, but nonetheless it is clear the Circuit has expressly ruled the state's immunity does not bear upon the issue of jurisdiction. This aspect of the decision requires examination.

The State has maintained throughout that its officials may not, in any capacity, under any circumstances, be called to answer in a tribal forum. This assertion is based upon the historical understanding of state immunity. "The contours of sovereign immunity are determined by the founders' understanding. . . ." *Alden v. Maine*, 527 U.S. at 734. It is simply not within the contemplation of the framers of the

constitution, who devised "our federalism," that such would be so.

"It is incontestible that the Constitution established a system of 'dual sovereignty.'" *Printz v. U.S.*, 521 U.S. 898, 918 (1997), *quoting from Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Circuit's decision deeply wounds "our federalism" by giving over to a third tier of sovereigns the adjudicative power to reach state officials. The decision redefines the dual sovereignty of constitutional federalism into a tripartite system, which has no textual basis in the Constitution.

The State does not quarrel with the wisdom of modern federal policies towards tribes, which have driven the expansion of tribal courts' authority. Instead it maintains that those policies cannot influence the definition of tribal court jurisdiction, if the result permits tribes to pierce the historical immunity of states and their officials.

In *Seminole Tribe of Fla. v. Florida,* 517 U.S. at 54, this Court stated that, "For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States'" (*quoting from Hans v. Louisiana,* 134 U.S. 1, 15 (1890). It was no more contemplated by the founders, the State would maintain, that tribal jurisdiction would exist over unconsenting States or their officials.

Not only was it uncontemplated, but uncontemplatable. The possibility of tribal jurisdiction over state officials, in the historical context, which is necessarily referenced to construe the states' immunity, is self-evidently implausible. There historically were no tribal courts. "Tribal courts in the Anglo-American mold were virtually unknown in 1789," *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). "[M]ost Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.' H.R.Rep. No. 474, 23d Cong.,

1st Sess., 18 (1834)." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Slowly tribal courts developed only in the twentieth century, as an outgrowth of the federal statutory scheme. *See generally Duro v. Reina*, 495 U.S. 676 (1990).

It is thus a certainty that the notion of state immunity never comprehended within it an exception for tribal court actions. The invention of such exception by the Ninth Circuit in this case deserves careful review, which the State respectfully submits may suitably be done at this time, by this Court. As the Court has been quick to review and condemn congressional acts which would "compromise the structural framework of dual sovereignty," *Printz*, 521 U.S. at 932, it should be equally quick to act when subordinate federal courts similarly compromise that framework, as was done in this case by the district and appellate courts.

2. Individual capacity and individual defenses.

The Ninth Circuit held that the state officials' assertions of qualified immunity were also not jurisdictional. "The law is clear that qualified immunity, rather than serving as a jurisdictional bar, 'is an affirmative defense that must be pleaded by a defendant official.'" 196 F.3d at 1031 (App. at A-14) (citation omitted). But this presumes, without authority, that individual capacity lawsuits operate against state officials in tribal court in the same manner as in federal court. The Circuit's conclusion that state officials' qualified immunity is not jurisdictional crosses a significant threshold in federal law, which the Supreme Court should scrutinize.

The State suggests that individual immunity of state officials is qualified in tribal courts, if at all, in a very different sense than it is in federal court. This suggestion is based upon the unique evolution of the qualified immunity in federal court.

It has taken more than a century to develop the principle that individual-capacity suits against state officials in federal court is not suit against a state. Inability to enforce the

federal civil rights law drove the necessity for its development. Until qualified immunity was articulated and refined as doctrine, the law now codified at 42 U.S.C. § 1983 was "remarkable for its insignificance." Peter W. Low and John C. Jeffries, Jr., *Civil Rights Actions: § 1983 and Related Statutes II*, n.1 (2d ed. 1994). The decision in *Wyatt v. Cole*, 504 U.S. 158 (1992) expressly traces development of qualified immunity in conjunction with development of § 1983 jurisprudence in federal court.

Thus qualified immunity was a necessary artifice. It is contrary to the reality that "generally, a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment. . . . In the generality of cases, constitutional tort actions against government officers are functional substitutes for direct access to government treasuries." Jeffries, *supra*, 84 Virginia L. Rev. at 50.

Because as a practical matter it trenches closely on states' sovereignty, qualified immunity should be confined to operation in federal courts, to serve its original purposes in connection with § 1983. From the legislative history of §1983, "[i]t is clear that one reason the legislation was passed was to afford a federal right in federal courts. . . ." *Monroe v. Pape*, 365 U.S. 167, 180 (1961). It is *not*, however, abundantly clear that the purpose of § 1983 was to afford a federal right in *tribal* courts.

In fact it is quite clear that Congress never intended § 1983 to operate in tribal courts. While the legislative history of § 1983 establishes that state courts might also enforce its provisions, *Patsy v. Florida Board of Regents*, 457 U.S. 496, 506 (1982) ("many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system"), there is no equivalent history to demonstrate that tribal courts were intended enforcers. Silence in the congressional debates about tribal court's authority under the measure can only signify absence of such intent. *Cf. Alden v. Maine*, 527 U.S. at

741 (silence in the legislative history for Eleventh Amendment on the subject of citizen suits against states in state courts "suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution").

Sovereign immunity "strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States." *Id.* at 757. Qualified immunity is part of this jurisprudence, and the Ninth Circuit in this case has deposited the delicate equilibrium of qualified immunity into the wholly dissimilar landscape of state-tribal relations. The State asserts that qualified immunity could and should be given a jurisdictional import instead, in the same manner as have individual immunity defenses of tribal officials in state and federal courts. *See e.g. Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (Ninth Circuit affirming dismissal of individually named tribal members in Title VII and § 1983 action, holding that "tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority"), *Miller v. Coyhis*, 877 F. Supp. 1262 (E.D. Wis. 1995), *Suarez v. Newquist*, 855 P.2d 1200, 1203 (Wash. App. 1993), *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), *Cameron v. Bay Mills Indian Community*, 843 F. Supp. 334, 336 (W.D. Mich. 1994). On this topic, *see generally* Timothy W. Joranko, *Tribal Self-Determination Unfettered: Toward a Rule of Absolute Tribal Official Immunity from Damages in Federal Court*, 26 Ariz. St. L. J. 987, 1009-1017 (1994). Analogously, if state officials are acting as officials when acts complained of occur, the tribal court should have no jurisdiction over them.

Even if the Ninth Circuit is correct in holding that individual immunity is not jurisdictional, review of the correctness of its treatment in this case remains essential. The qualified immunity enjoyed by an official in federal court is immunity from suit, and it is lost if not decided at the earliest

stages of litigation. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). In this case, as the Ninth Circuit would have it, the officials' ardent assertion of the defense stirred no response from the tribal court or the tribal court plaintiff. The Ninth Circuit would tender the entire matter back to the tribal court. This result now requires additional exhaustion after nine years of litigation. This renders the immunity, if not worthless, at least a very pale protection.

The question poised in this context is how much solicitude will the exhaustion doctrine create for tribal courts and tribal court plaintiffs. The consequence for a plaintiff in federal court who does not meet a challenge based upon a qualified immunity defense is dismissal of the action. *See e.g. Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991), *Scott v. Clay County*, 205 F.3d 867, 874 (6th Cir. 2000), *Erwin v. Daley*, 92 F.3d 521, 525 (7th Cir. 1996), *Dixon v. Richer*, 922 F.2d 1456, 1460 (10th Cir. 1991), *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992), *Bailey v. Board of Cty, Commrs. of Alachua Cty.*, 956 F.2d 1112, 1123 (11th Cir. 1992). Yet here—using the most clear-cut example—the Circuit Court refuses to dispose of a case against the head of Nevada's wildlife agency, even when all federal judges seem to concur that no claim, nor even a single allegation, is made against him. *See* 196 F.3d at 1031, 944 F. Supp. at 1469.

The Ninth Circuit's suggestion that qualified immunity was not broached in the tribal court ("we have never required a party to anticipate another party's qualified immunity defense before the question of subject matter jurisdiction had been decided," 196 F.3d at 1031) is flatly contradicted by the record. Anticipation was unnecessary, because the issue was expressly addressed and argued, *see* App. at J-5 to J-6 (Motion to Quash), and at K-8 to K-13, and it was decided, App. at L-1 and C-4 to C-7.

Finally, but not least, the Circuit's undifferentiated treatment of tort claims and constitutional tort claims alike under the qualified immunity doctrine makes an immense

expansion of the doctrine. The State has steadfastly maintained that an individual capacity lawsuit for common law tort claims is inconsistent with a pleading alleging officer actions taken under color of state law. Even if the matter is allowed to go forward in tribal court on the constitutional tort claims, it ought not go forward on the simple tort claims. The State acknowledges development of law to the contrary in the Ninth Circuit, *see Ashker v. California Dept. of Corrections*, 112 F.3d 392 (9th Cir. 1997) (plaintiff may sue state officials in federal court for tort when they are named in their individual capacities), but it submits that this line of reasoning relies on an improper application of the holding in *Hafer v. Melo*, 502 U.S. 21, which only addressed constitutional tort claims. Seemingly, the Ninth Circuit's view of state immunity is that it may be pierced by the simple expedient of proper captioning.

The effect of state officials' qualified immunity in tribal court is vitally important to the State. In all truth, its officers and employees will be loathe to enter into relations with tribes if they know they will be subjected to personal exposure in tribal courts. This effect, and all the attendant federalism concerns, should be carefully considered before deciding finally that individual immunity is not a bar to jurisdiction of tribal courts. The State therefore respectfully submits that involvement by this Court is fully warranted to reevaluate the Ninth Circuit's treatment of the issue.

B. THE SUPREME COURT SHOULD EXAMINE THE NINTH CIRCUIT'S EXPANSIVE DEFINITION OF TRIBAL SOVEREIGNTY AND ADJUDICATIVE JURISDICTION.

This matter is properly reviewed by this Court for the additional reason that it involves a substantial redefinition of tribal sovereignty. In absence of congressional action, this Court possesses ultimate authority to define tribal sovereignty, and thus tribal adjudicative jurisdiction. It is clearly not within the states' power to affect this law. It is, foremost, the United States Supreme Court which "has frequently been

required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

Thus this Court has directly supervised the development of tribal courts into the modern age. In their early development, tribes and their courts had authority:

> to make their own substantive law in internal matters, see *Roff v. Burney, 168 U.S. 218 (1897)* (membership); *Jones v. Meehan, 175 U.S. 1, 29 (1899)* (inheritance rules); *United States v. Quiver, 241 U.S. 602 (1916)* (domestic relations), and to enforce that law in their own forums, see, *e. g., Williams v. Lee, 358 U.S. 217 (1959).*

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1977). To the same effect, *see Montana v. United States,* 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . ").

In their nascent form, tribal courts thus served as a shield for tribes against outside influences. "The Court has been careful to protect the tribes from interference with tribal control over their own members." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 170 (1982) (Justice Stevens dissenting). The shield has, however, been gradually transformed into a sword. From truly internal matters such as "membership," "inheritance rules," and "domestic relations," the tribal fora have burgeoned into other subject areas, acquiring virtually plenary authority, and assuming jurisdiction coextensive with the general governmental powers which states possess.

In the course of this evolutionary development, this Court has also frequently been called upon as referee, to define the limits of tribal jurisdiction, and to stay the sword of tribal jurisdiction. *See e.g. El Paso Natural Gas Co. v. Neztsosie,*

526 U.S. 473 (1999), *Strate v. A-1 Contractors,* 520 U.S. 438 (1997), *Burlington Northern Railroad Co. v. Estate of Red Wolf,* 522 U.S. 801 (1997), *Duro v. Reina*, 495 U.S. 676 (1990), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

So it is now fitting and consistent with past practice that the Court opine upon this pioneering pronouncement by the Ninth Circuit, that a tribal court may exercise jurisdiction over state officials.

As an initial matter, this Court should review the interesting but arbitrary line drawn by the Ninth Circuit to explain its inconsistent result in *County of Lewis v. Allen,* 163 F.3d 509 (9th Cir. 1998) (en banc). In both cases, the tribe expressly authorized the presence of non-member peace officers. The Circuit pronounced in *County of Lewis v. Allen* that tribal consent by written agreement to non-tribal peace officer presence deprives the tribal court of jurisdiction, 163 F.3d at 515, but in the present matter held that a tribal judge's consent to the same by signing a search warrant does not. 196 F.3d at 1027-1028 (App. at A-10 to A-11).

The Court should also review the Ninth Circuit's creation of a bright-line test to replace the well-known formula for determining tribal jurisdiction. That formula requires careful examination of "tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. at 855-856.

In this case, the lower courts have departed from the formula. The Ninth Circuit has indulged the tribal court with a bright-line rule based on territorial control, rather than perform the necessary, careful inquiry. The Circuit professes to find authority for abandonment of the more inquiring analysis,

relying on the decision in *Strate v. A-1 Contractors,* 520 U.S. 438 (1997). 196 F.3d at 1025-1027 (App. at A-7 to A-8).

It is the State's simple contention that *Strate* provides no basis to establish a bright-line proxy for the *Nat'l Farmers Union* formula. Rather, as the State has always argued, that formula still applies. Under it, proper analysis would include examination of the extent to which tribal sovereignty has been necessarily divested, and would disclose that one of the necessarily divested tribal powers, *see United States v. Wheeler*, 435 U.S. 313, 323 (1978), is the power to call state officials to answer in tribal courts.

This limitation may be deduced from various lines of Supreme Court decision. One is that which confirms the nature and vigor of state sovereignty and immunity as a constitutional precept, as described in the earlier sections. Another is that line of cases describing tribes as limited sovereigns, *United States v. Wheeler*, 435 U.S. 313, 323 (1978), whose sovereignty—unlike that of the states—is subject to defeasance. *Compare, e.g., Escondido Mut. Water Co. v. La Jolla Band of Mission Indians,* 466 U.S. 765, 787 n.30 (1984) and *New York v. United States*, 505 U.S. 144, 183(1992) (even with state consent, Congress may not enlarge its powers under the constitution vis-à-vis the state).

Yet another path exists to arrive at the necessary conclusion that tribal courts are divested of jurisdiction over state officials. It is the one embarked upon already by this Court in its previous decisions in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), *Seminole Tribe of Fla. v. Florida,* 116 S. Ct. 1114 (1996), and *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997). The Court's general paradigm in these decisions bespeaks a clear barrier to tribal authority over states and their officials. The *Idaho* decision even ventured into tribes' authority over officials under the doctrine of *Ex Parte Young.*

The instant case represents yet one more increment in the development of federal law which, so far, this Court has deemed significant enough to address, and should address here to conclude the analysis.

C. THE CIRCUIT HAS MISAPPLIED THE TRIBAL EXHAUSTION RULE BY SEPARATING THE QUESTIONS OF TRIBAL COURT JURISDICTION AND STATE IMMUNITY.

1. Immunity Defenses Are Factors Relevant to the Jurisdictional Determination.

A related procedural issue exists in this matter, created by the Circuit's order of analysis. Though procedural, the issue is manifestly significant. It defines for the first time a protracted procedure for federal court review of actions by state officials challenging tribal jurisdiction. This new procedure deserves this Court's considered attention.

The lower courts bifurcated the analysis in this case, treating separately the issues of tribal court jurisdiction and state immunity. Factually, the Circuit's conclusion that the tribal court only ruled upon its own jurisdiction, and not the immunity questions, is an invention without any record support.[4] More importantly, it is a legal invention contrary to

---

[4] The Ninth Circuit did not acknowledge the tribal appellate court's express jurisdictional holding:

> We conclude not only the [sic] Hicks effected a valid form of private service of process upon the State Defendants, but because of three reasons the State Defendants are properly before the Fallon Tribal Court for suit. First, the State defendants acts of repeated voluntary entry onto the Fallon Indian Reservation and the Plaintiff's allotted Indian lands; Second, State Defendants [sic] repeatedly availing themselves, voluntarily, of the jurisdiction of the Fallon Tribal court that State Defendants [sic]; and, Third, the declaration of tribal law that the act of entry upon the Fallon Indian Reservation and Colony "shall conclusively de [sic] deemed consent to the jurisdiction" of the Fallon Tribal Court. We therefore remand to the Fallon Tribal Court to immediately set a trial date and

this Court's precedents, which indicate that immunity in part defines jurisdiction.

The Circuit reasoned that assertions of immunity, made by the state and its officials from the inception of this litigation, had not been ruled upon by the tribal court, 196 F.3d at 1029 (App. at A-13). Therefore, the Circuit concluded, the federal court should not decide the issue of sovereign immunity's effect on tribal court jurisdiction.

To support its conclusion, the Circuit wrote:

> Sovereign immunity has been treated by this court as an affirmative defense, "whatever its jurisdictional attributes." *ITSI TV Productions, Inc. v. Agricultural Associations, 3 F.3d 1289, 1291 (9th Cir. 1993)*. Thus, the defense is subject to our tribal court exhaustion rule, even though the issues the defense presents are jurisdictional in nature. Indeed, this court has held that "Eleventh Amendment immunity . . . does not implicate a federal court's jurisdiction in any ordinary sense." *Id.* Instead, this kind of immunity is raised and argued by the party seeking its benefit. Such arguments should be heard and decided in the first instance by the Tribal court.

Decision at 1029, n.12 (App. at A-23).

Appropriately in this reference, the Ninth Circuit accepted the treatment of a state Eleventh Amendment defense in federal court as a relevant analogy, but then failed to identify the proper treatment. It cited its decision in *ITSI TV Productions, Inc. v. Agricultural Associations,* which in turn depended upon this Court's holding in *Patsy v. Florida Board of Regents*, 457 U.S. 496, 515 n.19 (1982), that it has "never held that [the defense] is jurisdictional in the sense that it must be raised and decided by [the court] on its own motion." *Id.*

> allow the Plaintiff's civil jury trials to be heard without further delay consistent with this opinion.

App. at C-4 to C-5.

However, the decision omits any reference to this Court's subsequent opinion in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), which established the opposite rule. *See* F. Ryan Keith, *Must Courts Raise the Eleventh Amendment Sua Sponte?: The Jurisdictional Difficulty of State Sovereign Immunity,* 56 Wash. & Lee L. Rev. 1037, 1050 (1999) (quoting from *Pennhurst*, 465 U.S. at 119-20, that "the purpose of the Eleventh Amendment is to 'deprive[ ] a federal court of power to decide certain claims against States that would otherwise be within the scope of art[icle] III's grant of jurisdiction'").

The Circuit's reliance on *Patsy* instead of the *Pennhurst* model appears seriously misguided when viewed in context with this Court's recent pronouncements. In *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44 (1996), the state challenged federal court jurisdiction by invoking the Eleventh Amendment, and the issues were decided together as one and the same, part and parcel, and not divided for sequential treatment. When sued by the Seminole Tribe, the state of Florida "moved to dismiss the complaint, arguing that the suit violated the State's sovereign immunity from suit in federal court." 517 U.S. at 52. The district court denied the motion, but on interlocutory appeal, the circuit court–whose decision was affirmed by the Supreme Court–"disagreed with the District Court . . . that the Indian Commerce Clause grants Congress the power to abrogate a State's Eleventh Amendment immunity from suit, and *concluded therefore that it had no jurisdiction* over petitioner's suit against Florida" (emphasis added). 517 U.S. at 52-53.

In affirming the Eleventh Circuit's decision, this Court in *Seminole Tribe* explained that "[i]t was well established in 1989 . . . that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III." 517 U.S. at 64.

The same procedure—referring to immunity in order to determine jurisdiction—appears in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 691 (1999) ("we hold that the *federal courts are without jurisdiction* to entertain this suit against an arm of the State of Florida") (emphasis added); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 638-639 (2000) (affirming dismissal of three actions, including one in which a state litigant had "moved to dismiss the suit for lack of subject matter jurisdiction, contending it was barred by the Eleventh Amendment"); and *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) ("Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power . . . ."). *See also Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 633 (1999) ("Florida Prepaid moved to dismiss the action on the grounds of sovereign immunity," and the action was dismissed); *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 265 (1997) (in action against state as well as its individually-named officials, "defendants moved to dismiss the Tribe's complaint on Eleventh Amendment immunity grounds," and the action was dismissed).

Claims of sovereign immunity are also considered jurisdictional when raised by tribal officials. *See e.g. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit"). *See also Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416, 417-418 (9th Cir. 1989) (suit against tribe dismissed when "Band filed a motion to dismiss for lack of personal and subject matter jurisdiction and failure to state a claim, " and Circuit held that "the issue of tribal sovereign immunity is jurisdictional in nature"), *Marx v. Government of Guam*, 866 F.2d 294, 301 (9th Cir. 1989) (finding that Guam had sovereign immunity, Court concluded "the entire case should be dismissed for lack of jurisdiction"),

McClendon v. United States, 885 F.2d 627, 629 (9th Cir. 1989) ("issue of tribal sovereign immunity is jurisdictional in nature"), and *Arizona Public Service Co. v. Aspaas*, 69 F.3d 1026, 1032 (9th Cir. 1995) (citing *Chemehuevi Indian Tribe v. California St. Bd. of Equalization, 757 F.2d 1047, 1051* (9th Cir.), *rev'd in part on other grounds, 474 U.S. 9 (1985)*, for proposition that tribal sovereign immunity is jurisdictional in nature).

Besides being inconsistent with its own decisions addressing sovereign immunity, the Ninth Circuit's decision in this matter also conflicts with the law of other circuits. In *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000), when considering a tribe's assertion of immunity late in the proceedings, the Eighth Circuit held that sovereign immunity is a jurisdictional question, and is not an affirmative defense that, if not raised, is waived.

The Ninth Circuit's holding also sounds similar to the argument rejected in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.*, 506 U.S. 139 (1993) that "the Eleventh Amendment does not confer immunity from suit, but merely a defense to liability." This argument, the Court said,

> misunderstands the role of the Amendment in our system of federalism: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers, 123 U.S. 443, 505, 31 L. Ed. 216, 8 S. Ct. 164 (1887).*

506 U.S. at 146.

Notably, when tribal officials are sued, federal courts even address tribal and individual defenses together to determine their jurisdiction. *See e.g. Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991), *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476,

479-480 (9th Cir. 1985), *Cameron v. Bay Mills Indian Community*, 843 F. Supp 334, 336 (W.D. Mich. 1994).

Thus the Ninth Circuit has established an exhaustion rule without parallel for Nevada and its officials, in requiring a two-step, sequential consideration of tribal court jurisdiction and state immunity claims. Such unbalanced treatment deserves a careful reexamination by this Court.

2. The Circuit's Newly-Created Exhaustion Requirement for Immunity Conflicts With the Law of Another Circuit.

Even assuming, for argument's sake, that the Ninth Circuit correctly concluded the tribal court did not rule–and did not need to rule–on the issue of immunity, it is mistaken in its conclusion that tribal exhaustion is required now on the question of immunity. On this point, a recent decision of the First Circuit is at almost direct odds.[5]

The exhaustion requirement permits a tribal court to "determine, in the first instance, the scope of its own jurisdiction . . . ." *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 29 n.5 (1st Cir. 2000). This is the rule established in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

The First Circuit ruled, however, that immunity questions implicate different interests than the issue of jurisdiction, and those interests do not recommend exhaustion of immunity questions in tribal court. "[T]he issue of whether a suit may be brought against a tribe at all, in any forum, is of equal interest to the federal and tribal courts." *Ninigret*, 207 F.3d at 29 n.5. Since tribal immunity is not a peculiarly tribal concern, it is not left to the tribal court to decide. *Id.*

---

[5] The only difference in circumstances is that the First Circuit considered the need to exhaust the immunity issue when asserted by a tribe, not a state.

Even more so, the immunity of state officials in tribal courts cannot be described as a peculiarly tribal concern. Therefore, even if jurisdiction and immunity are two different concepts, once jurisdiction has been determined, it should not be necessary to submit to further exhaustive tribal court analysis on immunity issues before a federal court will declare the relevant law.

This Court, respectfully, should reconcile these disparate approaches to immunity issues within the tribal court exhaustion doctrine, and further elucidate the doctrine as a refinement of the principles first enunciated by this Court in *National Farmers Union* and *Iowa Mutual*.

II. THE NINTH CIRCUIT COURT OF APPEALS HAS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT ON THE EFFECT TO BE GIVEN THE RULE IN *MONTANA v. U.S.*, 450 U.S. 544 (1981).

This case presents the Supreme Court its first clear opportunity to explain whether the rule of *Montana v. U.S.*, 450 U.S. 544 (1981), applies when a cause of action arises on land controlled by a tribe.

In *Montana*, this Court set out a model for determining when tribal civil jurisdiction exists over nonmembers within a reservation. *Montana* created a presumption against tribal jurisdiction, with two exceptions based upon (1) consent of the nonmember to tribal jurisdiction, and (2) "conduct [which] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The facts in *Montana,* however, involved regulation of nonmember activities occurring on non-tribal land within a reservation. These circumstances have become the pivotal focus in a battle between proponents and opponents of a broad reading of *Montana*.

The opponents of the broad reading, and the Ninth Circuit, rest upon the decision in *Williams v. Lee,* 358 U.S.

217 (1959) for their position that, on tribally controlled land, a presumption exists in favor of tribal jurisdiction over nonmembers.[6]

Thus this dialectic has crystallized into a conflict between two competing lines of authority from this Court, *Montana* versus *Williams v. Lee*. Not surprisingly, proponents and opponents profess to see affirmation of their respective positions in the Court's recent pronouncements. The Ninth Circuit in the instant matter discovered--based upon *Strate*, 520 U.S. 438, and *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999)--an "evolving Supreme Court precedent that stresses membership and rights of land ownership as sources of tribal power," 196 F.3d at 1026 (App. at A-8). Based upon this "evolving precedent," it concluded the "*Montana* presumption against tribal court jurisdiction does not apply in this case." *Id.* at 1028 (App. at A-11). "Once a tribe's authority to regulate activities on its land has been demonstrated, civil jurisdiction regarding those activities follows." *Id.* at 1029 (App. at A-12).

The Ninth Circuit's conclusion is contrary to the holdings from two other circuit courts. The Eighth Circuit, in *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996), *affirmed*, 520 U.S. 438, reasoned to the opposite conclusion about *Montana's* application. It determined that *Montana's* analytical framework was applicable to determine tribal court jurisdiction whenever a cause of action arose on tribal lands. It recited numerous subsequent pronouncement by this Court to support its conclusion, and ended with a quote from *South Dakota v. Bourland*, 508 U.S. 679 (1993), that "after Montana, tribal sovereignty over nonmembers 'cannot survive without

---

[6] The State would distinguish *Williams v. Lee* from the facts of this case by (1) the absence of state officials as defendants, and (2) the presence of a tribal member as defendant, whose protection from possible bias in state court could well have been the basis for the decision.

express congressional delegation.'" 76 F.3d at 935 (citation omitted).

The Tenth Circuit has expressly rejected territorial ownership as the litmus test for jurisdiction, in *Atkinson Trading Co, Inc. v. Shirley*, No. 98-2247, 2000 U.S. Appeal LEXIS 8609 (10th Cir. 2000). Ironically, the Tenth Circuit addressed the issue in order to extend tribal jurisdiction onto non-tribal lands. The Navajo Nation asserted authority to tax non-member guests of a non-member business establishment "held in fee simple, but completely surrounded by Navajo Nation Reservation trust lands." *Id.* at *1. The Navajo Nation urged analysis of its jurisdiction based upon the decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The *Merrion* Court analyzed tribal jurisdiction by reference to whether the nonmember had accepted the privilege of carrying on business on the reservation and benefited from the provision of tribal governmental services. 455 U.S. at 137-138.

Review in *Merrion* involved tribal, not fee lands. 455 U.S. at 135. Nonetheless, the Tenth Circuit in *Atkinson* applied the *Merrion* analysis to the non-tribal land case before it. After scrutinizing the cases, it rejected the view that "*Montana, Brendale, South Dakota v. Bourland*, 508 U.S. 679 (1993), *Strate*, and *Merrion* should be read to establish one rule for assertions of tribal jurisdiction on fee land (*Montana*, et al.) and another rule for tribal land (*Merrion*)." 2000 U.S. Appeal LEXIS at *25. It concluded, directly contrary to the Ninth Circuit, that "Our reading of Supreme Court precedent rejects the arbitrary factual basis of fee status as the determinative factor of the *Montana* standard . . . ." *Id.* at *42.

Thus the Ninth Circuit is in direct conflict with both the Eighth and the Tenth Circuit. In order to limit future litigation, and for the benefit and guidance of all who deal with tribes, it behooves this Court to clarify the significance of the *Montana* rule, and conform the law among the circuits on this important point.

CONCLUSION

This petition presents legal issues that are of the first order of significance. The Ninth Circuit has unequivocally held that a tribal court has jurisdiction over civil actions naming state officials. This radically redefines the relationship between tribes and states. In doing so, it also redefines state and tribal sovereignty, cutting to core principles of federal law.

The appeals court has also redefined the legal analysis used for determining jurisdiction of tribal courts over nonmembers, and in the process creates a conflict among the circuits on this important subject.

Finally, the Ninth Circuit has made new law on the subject of tribal exhaustion, requiring an inordinately prolonged process whenever immunity is present as an issue.

Beyond its purely legal and academic importance, the decision of the Ninth Circuit will constrict the constructive interplay between tribes and states. For Nevada at least, a state with twenty-six tribes and in which tribal-state relations have been remarkably amicable, this means cooperative endeavors will become more difficult in areas such as law enforcement, fire protection, transportation, education, and environmental protection, to name but a few. Concern for these real consequences, as much as the more esoteric legal disputes, animate this petition. It should likewise bear on this Court's decision whether to entertain the petition.

Review by this Court at this point in the litigation is critical. Review of questions of law concerning tribal court jurisdiction is *de novo*. Later review challenging tribal court findings on immunity defenses, after jurisdiction is already established, will be much more deferential and limited. *Cf. FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990). Respectfully, therefore, the State's petition should be granted now in order for this Court to exercise its full authority on these vital questions of federal law.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General of the State of Nevada

C. WAYNE HOWLE*
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1227

Counsel for Petitioners
*Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

State of Nevada; William Molini; Nevada Division of Wildlife; Michael C. Spencer, Rich Ellington, and Bill Fitzmorris,
Plaintiffs-Appellants,

v.

Floyd Hicks; Tribal Court in and for the Paiute-Shoshone Tribes; Honorable Joseph Van Walraven,
Defendants-Appellees.

/

No. 96-17315

D.C. No. CV-94-00351-DWH

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
David W. Hagen, District Judge, Presiding

Argued October 7, 1997

Submitted November 4, 1999
San Francisco, California

Filed November 9, 1999
Amended January 24, 2000

Before: Alfred T. Goodwin, Betty B. Fletcher and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge B. Fletcher;
Dissent by Judge Rymer

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs appealed from an order of the United States District Court for the District of Nevada which, denied them summary judgment and granted summary judgment to defendants Native American and tribal court on their claims against state officials for tribal common law torts and federal and tribal civil rights violations.

OVERVIEW: Plaintiffs, the State of Nevada and named state officials, appealed a district court decision denying them summary judgment and granting summary judgment to defendants Native American and tribal court on their claims against state officials for tribal common law torts and federal and tribal civil rights violations. The court of appeals affirmed summary judgment against plaintiffs. The court found that the tribal court had subject matter jurisdiction over the claims brought by Native American defendant against the state officials and held that the issue of qualified immunity was not exhausted before the tribal court and therefore was not properly before the district court. The court concluded the district court similarly should have refrained from addressing sovereign immunity, leaving the issue to the tribal court in the first instance. Accordingly, the court affirmed the district court's determination that the tribal court has jurisdiction over the actions underlying the instant case.

OUTCOME: Judgment affirmed granting summary judgment to defendants, Native American and tribal court, where tribal court had subject matter jurisdiction over claims brought by Native American defendant and the issue of plaintiffs' qualified immunity was not properly before the district court.

COUNSEL:

C. Wayne Howle, Deputy Attorney General, Carson City, Nevada, for the plaintiffs-appellants.

Melody L. McCoy, Native American Rights Fund, Boulder, Colorado, for the defendants-appellees.

Mitchell Wright, Reno, Nevada, for defendant-appellee Floyd Hicks.

OPINION:

AMENDED OPINION

B. FLETCHER, Circuit Judge:

This case concerns the jurisdiction of a tribal court over claims against state officials for tribal common law torts and federal and tribal civil rights violations. The events giving rise to these claims took place on Indian-owned land on a reservation.

The State of Nevada and named state officials appeal the decision of the district court denying them summary judgment and granting summary judgment to Floyd Hicks and the tribal court. The district court held that the tribal court had jurisdiction to hear the suit brought by Hicks against state officials for tribal common law torts and federal and tribal civil rights violations occurring on Indian-owned land. It also held that the tribal court action against the state officials in their individual capacities was not barred by sovereign immunity. It declined to review on the merits the officials' claims of qualified immunity from suit because they had not been exhausted before the tribal court. We affirm the district court's holding that the tribal court has jurisdiction, and we affirm its holding that the issue of qualified immunity was not exhausted before the tribal court and therefore was not properly before the district court or this court. We conclude the district court similarly should have refrained from addressing sovereign immunity, leaving the issue to the tribal court in the first instance.

I.

Floyd Hicks is an enrolled member of the Fallon Paiute-Shoshone Tribe ("Tribe"), a federally recognized Indian tribe with over 900 members. The Tribe's reservation in western Nevada consists of about 8,000 acres of land held by the federal government in trust for the Tribe and for individual tribal members. Hicks lives within the Tribe's reservation on allotted land held by the government in trust for him.

On August 30, 1990, Michael Spencer, a Nevada state game warden, obtained a search warrant from the New River Justice Court to search Hicks' property for evidence of the possession or killing of a big horn sheep of the California subspecies, a gross misdemeanor under Nev. Rev. Stat. § 501.376. The warrant

provided, however, that the state court lacked jurisdiction over the Fallon Paiute-Shoshone reservation and that the warrant was valid only if approved by the Fallon Tribal Court.

That same day, a tribal judge approved the warrant but limited the search to the "exterior premises and any vehicles thereon." Spencer, accompanied by a tribal police officer, allegedly executed the warrant and removed at least one mounted big horn sheep head trophy from Hicks' residence. However, the trophy was apparently of the Rocky Mountain subspecies, and it was later returned to Hicks. Hicks asserts that the trophy was damaged when returned.

On June 12, 1991, Spencer applied for and received another state search warrant to seek evidence for the same state offense. Spencer, along with state game wardens Rich Ellington and Bill Fitzmorris, executed the warrant that same day, again accompanied by tribal police and with tribal court approval. One or more big horn sheep head trophies belonging to Hicks were removed from Hicks' residence. Once again, it was ultimately determined that the trophies were not evidence of any state crime or game violation and they were returned to Hicks.

Hicks filed two complaints in Fallon Tribal Court for money damages alleging damages resulting from the actions of the state and tribal officials on August 30, 1990, and June 12, 1991. The complaints named William Molini, Director of the Nevada Department of Wildlife, Michael Spencer, Rick [sic] Ellington, and Bill Fitzmorris as defendants in both their official and individual capacities, and alleged a variety of claims under the Indian Civil Rights Act ("ICRA"), *25 U.S.C. § 1302,* as well as tort claims under tribal common law. By amended complaint, Hicks claimed violation of unspecified federal and tribal civil rights. n1

The tribal court held, in a written order, that it had jurisdiction over the actions. Following a challenge to Hicks' service of process by publication, the tribal court quashed the service as ineffective. Following cross-appeals, the Intertribal Appellate Court reversed and remanded for trial, upholding both the service of process and the jurisdiction of the tribal court. Two weeks later, the State of Nevada and the named state officials (hereinafter "Nevada") filed the present action in federal district court against Hicks, the tribal court and tribal judge (hereinafter "tribal appellees"), for declaratory relief regarding the issue of tribal court jurisdiction. n2

Before the district court, the parties presented cross-motions for summary judgment on whether the tribal court had jurisdiction over the claims against the state officials. Meanwhile, the tribal court granted Hicks' motions voluntarily to dismiss the claims against the state officials in their official capacity. The district court then held that the dismissal mooted the issue of tribal court jurisdiction over the state officials in their official capacities.

After oral argument and supplemental briefing, the district court issued an order denying Nevada's motion for summary judgment and granting the motion for summary judgment made by Hicks and the tribal appellees. In its order, the district court held that the Intertribal Court of Appeals did not err in holding that service of process was in accordance with tribal law. n3 The district court further held that the tribal court had subject matter jurisdiction over the claims brought by Hicks against the state officials in their individual capacities, and that the claims were not barred by sovereign immunity. Additionally, the district court held that two issues, the claims of qualified immunity by the state officials and whether any claims lie against William Molini, had not been exhausted in the tribal courts.

II.

As a threshold issue, the district court correctly held that it had federal question jurisdiction to determine whether the tribal court had jurisdiction. *See 28 U.S.C. § 1331; see also National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985).* We review determinations of federal law regarding the extent of tribal court jurisdiction de novo. *See FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313-14 (9th Cir. 1990), cert. denied, 499 U.S. 943, 113 L. Ed. 2d 459, 111 S. Ct. 1404 (1991).*

In determining the tribal court's jurisdiction, the district court first noted that no federal statutes provide guidance on the extent of tribal court jurisdiction over civil matters. The district court then adopted as basic guiding principles the distinction between civil and criminal jurisdiction, and the recognition by the courts of "a strong geographic component" distinguishing incidents occurring on Indian-owned land from those on non-Indian owned land. The district court also acknowledged the "general proposition" of *Montana v. United States, 450 U.S. 544, 565, 67 L. Ed. 2d 493, 101*

S. Ct. 1245 (1981), that on non-Indian owned land "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," n4 but doubted its applicability to the instant case after finding Hicks' allotment to be Indian-owned land.

The district court suggested instead that the applicable rule on the facts before it was that of *Williams v. Lee*: where the underlying incidents occur on Indian-owned land, tribal court jurisdiction is presumed unless affirmatively limited by an act of Congress. *See Williams v. Lee, 358 U.S. 217, 222, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)* ("This court has consistently guarded the authority of Indian governments over their reservations . . . . If this power is to be taken away from them, it is for Congress to do it."). However, the district court expressed concern that the Supreme Court had not yet made clear the circumstances in which the *Montana* rule should be applied and assumed without deciding for the purposes of this case that it would apply. It ultimately concluded that, even were *Montana* to apply, the tribal court would still have jurisdiction because the underlying facts fell within the exceptions to *Montana*'s general presumption against jurisdiction.

Subsequent to the district court's decision, the Supreme Court decided *Strate v. A-1 Contractors, 520 U.S. 438 (1997)*. Nevada argues on appeal that *Strate* interprets *Montana* as precluding tribal court jurisdiction over civil actions involving non-Indians regardless of whether the underlying incidents occurred on Indian-owned land or non-Indian owned land. However, the *Strate* Court made no such determination, a fact we recently noted in *County of Lewis v. Allen, 163 F.3d 509, 514 (9th Cir. 1998)*.

We now affirm the district court's determination that the tribal court has jurisdiction over the actions underlying the instant case. We also affirm the district court's rulings on the issues of sovereign immunity and qualified immunity.

A.

The Court in *Strate* held that a tribal court lacked jurisdiction to hear civil tort claims against a non-Indian brought by the widow of a tribal member, and her five adult tribal member children, for injuries occurring on a public highway maintained by the State of North Dakota under a federally granted right-of-way over tribal reservation land. *520 U.S. at 442*. In *Strate*, the Court clarified its interpretation of *Montana*, which dealt with tribal regulation of

hunting and fishing in a state-owned river running through a reservation. *Strate* makes clear that the Court's holding in *Montana* is equally applicable to tribal court jurisdiction over incidents occurring on a highway running through a reservation over which the tribe had ceded all right to control access. However, the *Strate* Court carefully expressed "no view on the governing law or proper forum when an accident occurs on a *tribal* road within a reservation." *Id. at 442* (emphasis added).

The Court emphasized in *Strate* that the decision in *Montana* related to "reservation land acquired in fee simple by non-Indian owners." *Id. at 446.* By contrast, "the *Montana* Court recognized that the Crow Tribe retained power to limit or forbid hunting or fishing by non-members on land still owned by or held in trust for the Tribe." *Id.* The Court also reiterated that it "'can readily agree,' in accord with *Montana*, . . . that tribes retain considerable control over non-member conduct on tribal land." *Id.* (quoting *Montana, 450 U.S. at 557).* However, finding that the stretch of highway at issue was "aligned . . . for the purpose at hand, with land alienated to non-Indians," the Court in *Strate* opined that the "decision in *Montana* . . . governs this case," *520 U.S. at 456,* and further decided that neither of the two *Montana* exceptions applied to the facts in that case. n5

Again in *El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999),* the Court emphasized the significance of land-ownership to the jurisdictional inquiry. That case examined the extent of the doctrine requiring tribal court exhaustion for claims arising under the *Price Anderson Act. 119 S. Ct. at 1433.* Members of the Navajo Nation brought suit against mining companies for injuries arising from uranium mining and processing on the Navajo Nation Reservation by the defendants. *Id.* at 1434. The Court found for El Paso on the ground that the Price-Anderson Act preempted the injury claims, requiring that actions for liability for nuclear accidents be brought only in federal court. The Court, however, rejected the mining companies' argument that under *Strate*, a tribal court has jurisdiction over nonmembers only where the tribe has regulatory jurisdiction with respect to the matter at issue. *Id.* at 1436 n.4. The Court found petitioners' reliance on *Strate* was misplaced, because, in contrast to the claims in *Strate*,

which arose on a state highway, the events at issue in *El Paso* occurred on tribal lands. *Id.*

Our post-*Strate* opinions are consistent with evolving Supreme Court precedent that stresses membership and rights of land ownership as sources of tribal power. *See, e.g.*, William C. Canby, Jr., *American Indian Law* 72-78, 128-41 (1998); n6 Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision, 55 U.Pitt. L. Rev. 1 (1994).* In *Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), cert. denied, 523 U.S. 1074, 118 S. Ct. 1516, 140 L. Ed. 2d 669 (1998),* we held that a tribal court has no jurisdiction over a suit by a tribal member against a nonmember arising from an accident on a state highway that runs through the reservation. The facts of *Wilson* mirrored the facts of *Strate* almost precisely: the highway at issue in *Wilson* was a state highway constructed on a right of way granted pursuant to a federal statute with the consent of the Blackfeet Nation. *Id. at 813-14.* The general public had unrestricted access to the road, and no statute or treaty authorized the tribe to govern the conduct of nonmembers on the highway. *Id. at 814.*

In *County of Lewis v. Allen, 163 F.3d 509, 514 (9th Cir. 1998),* we looked to "the landowner's right to exclude" certain nonmembers from the reservation, rather than land ownership per se, as the source of tribal power. Central to that case is a law enforcement agreement between the Nez Perce Tribe and the State of Idaho that granted jurisdiction to the state to enforce misdemeanor laws. Acting under the authority of the agreement, a deputy county sheriff arrested a tribal member, Allen, on the reservation for disturbing the peace within the reservation. Allen brought suit in tribal court against the county and its law enforcement officers for torts arising out of the arrest. Allen's residence was on fee land not owned by the tribe or the federal government, but the record does not reflect whether the fee was owned by an Indian or non-Indian. *Id. at 512 n.1.* The court stated that, "from the standpoint of the exercise of adjudicative authority over nonmember county law enforcement officers, it does not matter how the land was owned because the consent to criminal jurisdiction was tantamount to alienation of the land to non-Indians

for the limited purpose [of patrolling the reservation, investigating minor crimes and making arrests]." *Id. at 514.*

We saw the Agreement as "a significant alienation of tribal sovereignty and control." *Id.* Our analogizing to *Strate* was explicit: "Like the tribes in *Strate*, which consented to and received payment for a highway easement, the Nez Perce Tribe ceded its 'gatekeeping right,' by consenting to and receiving the benefits of state law enforcement protection." *Id.* We found that the tribal court, having surrendered its exclusive criminal jurisdiction over Indians for minor criminal acts committed on the reservation, had surrendered its civil jurisdiction over the conduct of county officials acting pursuant to the Agreement. *Id.*

Finally, in *State of Montana v. King, 191 F.3d 1108, 1999 WL 694953 (9th Cir. 1999),* we held that an Indian tribe lacked authority to enforce its employment ordinance against a state for work done on a state owned right-of-way. Our decision in *King* is in line with the *Strate* rule: tribes lack authority to regulate, and thus power to adjudicate, activities on land alienated to non-Indians.

Unlike *Montana*, *Strate*, *Wilson*, *County of Lewis*, and *King*, the incidents underlying the instant case occurred on Indian-owned, Indian-controlled land, over which the Tribe retained its right to exclude non-members. n7 In the absence of federal statutes limiting it, the Tribe has exclusive criminal jurisdiction in Indian country over minor crimes committed by Indians. *See Ex parte Crow Dog, 109 U.S. 556, 27 L. Ed. 1030, 3 S. Ct. 396 (1883).* State officers have no jurisdiction over such crimes. Outside of Indian country, the state has general criminal jurisdiction over all persons, including Indians, *see, e.g., Hagen v. Utah, 510 U.S. 399, 127 L. Ed. 2d 252, 114 S. Ct. 958 (1994).* Within Indian country, however, the state's jurisdiction is generally limited to those crimes that do not concern Indians or Indian interests. *See id.* Before a state official can conduct a search and seizure on the reservation to investigate a state crime, a tribal search warrant must be issued by a judge of the tribal court. *See* Fallon Tribe Law & Order Code, Title 1 § 4-40-010, 4-40-030(a)); *see also United States v. Anderson, 857 F. Supp. 52 (D.S.D. 1994)* (holding that a state officer lacks power to search the reservation residence of an Indian parolee from state prison, even though the parolee consented to searches as a condition of parole).

In this case, as part of his investigation into a suspected violation of a state game law, Warden Spencer filed an affidavit of probable cause in the New River Township, County of Churchill on August 30, 1990. The state court issued a warrant that stated:

YOU ARE HEREBY ORDERED, SUBJECT TO OBTAINING APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES, to search the said premises . . . .

This Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute-Shoshone Tribes of the Fallon, Churchill County, Nevada.

The same application and approval procedure was followed on June 12, 1991. On both occasions, Spencer was accompanied by a tribal police officer when he executed the warrant at Hicks' residence.

Unlike the Agreement in *County of Lewis*, the warrant in this case bestows no broad grant of authority upon the State of Nevada. The Tribe retained sovereignty over the land upon which the search and seizure took place. The land on which Hicks' residence stood was neither open to the public, nor controlled or maintained by any entity other than the Tribe. When the tribal court agreed to grant the state warden's request for a warrant, it was exercising its "gatekeeping right." The tribal court was free to exclude state officials engaged in law enforcement activities on the reservation. The tribal court was the sole authority to which the state warden could apply - and to which it in fact had to apply - for permission to execute a search warrant on the reservation. n8 Further underscoring the exclusivity of tribal jurisdiction is the fact that the state warden was accompanied by a tribal officer upon the execution of each warrant.

Each authorization of the execution of the warrants marked an isolated incident wherein the tribal court granted a state official permission to enter the reservation as part of a state investigation into an alleged violation of state law. There was no cession of criminal law jurisdiction, or indeed of any law enforcement jurisdiction at all. Unlike in *County of Lewis*, no benefit was conferred on the Tribe. Law enforcement on the reservation remained in the hands of the Tribe. The tribal court merely granted

a state official's request to come onto the reservation for a limited, clearly delineated purpose under circumstances where all inherent jurisdictional authority lay with the Tribe. We emphasize that the tribal court modified the original search warrant by restricting the authorized search to "exterior premises only and to vehicles thereon," demonstrating that the Tribe retained authority to direct the state officers' activities on tribal land.

This case then, involves no "significant alienation of tribal sovereignty and control" over law enforcement or over Indian-owned land within the reservation. *See County of Lewis, 163 F.3d at 514. Cf. Strate, 520 U.S. at 442* (holding that the grant of the right-of-way to the state, which precluded the tribe from exercising proprietary rights of exclusion, rendered the highway the equivalent of non-Indian fee land); *Montana, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245* (holding that an Indian tribe had no authority to regulate hunting and fishing by non-Indians on non-Indian owned fee land within the reservation); *County of Lewis, 163 F.3d at 514* ("The consent [by the tribe] to criminal jurisdiction [of the state] was tantamount to alienation of the land to non-Indians . . . ."); *Wilson, 127 F.3d at 813-15* (same as *Strate*, where plaintiff was a tribal member). Instead, it concerns the effects of state officers' actions that allegedly exceeded the permission given by the Tribe in the search warrants, and alleged damages to property that possibly should not have been seized at all.

We find that the *Montana* presumption against tribal court jurisdiction does not apply in this case. Instead, in line with *Strate* and *County of Lewis*, we look to the tribe's power to exclude state officers from the land at issue. The Tribe's unfettered power to exclude state officers from its land implies its authority to regulate the behavior of non-members on that land. *See Strate, 520 U.S. at 456* (land treated as non-Indian fee land because Tribe "cannot assert a landowner's right to occupy and exclude"); *South Dakota v. Bourland, 508 U.S. 679, 692, 124 L. Ed. 2d 606, 113 S. Ct. 2309 (1993)* ("when Congress has broadly opened up such land to non-Indians [i.e., abrogated the tribe's power to exclude], the effect . . . is the destruction of *pre-existing* Indian rights to regulatory control") (emphasis added); *Brendale v. Confederated Tribes, 492 U.S. 408, 433-448, 106 L. Ed. 2d 343, 109 S. Ct. 2994 (1989)* (opinion of Stevens and O'Connor, JJ.) (tribe can zone non-member

fee land as long as tribe retains power to control access to the land); n9 *Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982)* (tribe has power to regulate structures built by non-members which extend over the lake bed held in trust for tribe). n10

Once a tribe's authority to regulate activities on its land has been demonstrated, civil jurisdiction regarding those activities follows. The Supreme Court made clear in *Strate* that "where the tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Strate, 520 U.S. at 453.* Any sovereign, even a limited sovereign, must have the power to adjudicate whatever it has the power to legislate. A sovereign who must depend on the courts of another sovereign to adjudicate violations of its own rules is little more than a landowner.

In this case, the Tribe clearly had the power to exclude state officers from its land and to regulate the behavior of state officials present on its land pursuant to limited tribal permission. There was no general cession of jurisdiction by the Tribe; instead there was a controlled, limited permission for state officials to come onto tribal land and comport themselves within to the parameters of that permission. Disputes regarding the officials' behavior under this permission are within the jurisdiction of the Tribe.

Because the tribal court has already ruled on the issue of tribal court jurisdiction, Nevada exhausted its tribal remedies on that issue. The question of tribal court jurisdiction is therefore ripe for federal review. We conclude that the tribal court has subject matter jurisdiction over the claims brought by Hicks against the state officials. n11

B.

Nevada suggests that the actions of the state officials in this case were undertaken as part of their official duties and that therefore the officials should be shielded from liability under a derivative of the doctrine of sovereign immunity. This argument concerns an affirmative defense and is not properly before the court, since the state did not exhaust its remedies regarding the sovereign immunity defense before the tribal court. n12 While the tribal court did find that "it is not prevented by doctrines of sovereign or qualified immunity from lawfully exerting personal

jurisdiction over specially appearing State defendants," this finding was clearly restricted to the issue of personal jurisdiction and did not include any findings regarding the affirmative defense of sovereign immunity. In addition, the tribal court's ruling came before Hicks voluntarily dismissed the State of Nevada and all state defendants named in their official capacities. n13 Therefore, the issue of sovereign immunity as an affirmative defense for state officials named individually in this action has not been considered on the merits by the tribal court. We therefore do not reach the issue.

Nevada also argues that the district court erred in holding that it was precluded by considerations of comity from ruling on the state officials' claims of qualified immunity. Nevada contends that the state officials sued by Hicks were entitled to summary judgment on the issue of tribal court jurisdiction because Hicks failed to overcome their claims of qualified immunity from suit. However, Nevada does not argue that its claim fits into any of the exceptions to the exhaustion requirement. Suggesting that no case has yet determined the existence or nature of the qualified immunity available to state officials in tribal court, Nevada instead invites this court to define the applicable test. We decline to do so.

The Supreme Court in *Strate* reaffirmed its earlier decisions requiring, as a matter of comity and with very narrow exceptions, n14 the exhaustion of tribal remedies before the federal courts rule on the jurisdiction of the tribal courts. *See Strate, 520 U.S. 438, at 448-454, 137 L. Ed. 2d 661, 117 S. Ct. 1404* (discussing *Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987),* and *National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985)); see also Burlington Northern R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 (9th Cir. 1991)* (emphasizing the exhaustion requirement).

The district court correctly applied this exhaustion requirement to the issue of qualified immunity. *See, e.g., Stock West Corp. v. Taylor, 964 F.2d 912, 920 (9th Cir. 1992)* (en banc) (holding that the district court abused its discretion in addressing a qualified immunity defense on the merits, and explaining that "because a determination of this issue will require a careful study of the application of tribal laws, and tribal court decisions, the district

court should have stayed its hand until after the Colville Tribal Courts have the opportunity to resolve the question").

As a preliminary matter, we note that Nevada makes the same mistake with regard to qualified immunity that it made with sovereign immunity, by contending that it is an issue that impacts the subject matter jurisdiction of the tribal courts. The law is clear that qualified immunity, rather than serving as a jurisdictional bar, "is an affirmative defense that must be pleaded by a defendant official." *Harlow v. Fitzgerald, 457 U.S. 800, 815, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); see also Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 n.4, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991)* (noting qualified immunity is an affirmative defense that is "wholly distinct" from issues of jurisdiction). We reject Nevada's contention to the contrary.

Alternatively, Nevada argues that the issue of qualified immunity was in fact exhausted before the tribal court. To this end, Nevada quotes the ruling by the Inter-Tribal Appellate Court affirming the decision of the tribal judge that "the doctrine of . . . qualified immunity does not prevent the Fallon Tribal Court from exerting personal jurisdiction over the State Defendants," and argues that this constitutes a decision on the merits and thus satisfies the exhaustion requirement. However, this argument likewise disregards the fact that qualified immunity is an affirmative defense and not a jurisdictional bar. A holding by the tribal court that it has jurisdiction cannot be construed as a ruling on the merits. The district court did not err in finding that the exhaustion requirement had not been satisfied.

Nevada also argues that, even if the issue of qualified immunity was not exhausted in the tribal courts, it should be treated as having been since Hicks had ample opportunity to respond to the claims of qualified immunity. Nevada suggests that if the tribal court record is bereft of supportive evidence for Hicks' effort to overcome the state officials' individual immunity, it is his own fault.

However, we have never required a party to anticipate another party's qualified immunity defense before the question of subject matter jurisdiction had been decided. *See, e.g., McDonald v. United States, 102 F.3d 1009, 1011 (9th Cir. 1996)* (holding that "there is 'no basis for imposing on the plaintiff an obligation to anticipate such a defense'" of qualified immunity) (quoting *Gomez v. Toledo,*

446 U.S. 635, 640, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980)). The argument by Nevada here again conflates the affirmative defense of qualified immunity with issues relating to the tribal courts' subject matter jurisdiction. The district court did not err in declining to reach the merits of the qualified immunity issue.

Lastly, Nevada argues that Hicks failed to state a claim against William Molini, Director of the Nevada Department of Wildlife, because Molini was not alleged to have participated personally in the acts of the game wardens in obtaining and executing the search warrants and seizing Hicks' property.

The district court noted that "the voluntary dismissal of the official capacity claims by the tribal court may well have made personal and subject matter jurisdiction over Molini . . . inappropriate." However, since "this issue was never before the tribal court because when the motion to quash rulings were made, claims against the state defendants in their official capacities had not yet been voluntarily dismissed," the district court declined to rule on whether a claim had been stated against Molini, "leaving this unexhausted issue to the tribal court." The analysis of the exhaustion requirement set out above applies with equal force here. The district court did not err.

III.

The tribal common law torts and federal and tribal civil rights violations underlying this case occurred on Indian-owned land, the allotment on the Fallon Paiute-Shoshone Reservation held in trust by the federal government for Floyd Hicks. The tribal court has civil jurisdiction in this case based on the Tribe's right to adjudicate disputes arising out of actions within tribal regulatory authority that take place on Indian land. The district court did not err in holding that the tribal court has jurisdiction.

Nevada's claims of sovereign and qualified immunity on behalf of the state officials and of Hicks' failure to state a claim against William Molini have not been exhausted in tribal court. Although exhaustion is not a jurisdictional prerequisite, it is required as a matter of comity. *Strate, 520 U.S. at 453.* The district court did not err in declining to reach the merits of those claims.

AFFIRMED.

DISSENT:

RYMER, Circuit Judge, dissenting:

I part company on subject matter jurisdiction, because I board the train from a different station. As I see it, we have to start with *Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996),* which applies the framework established in *Montana v. United States, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981),* to determine whether there is tribal jurisdiction over civil disputes involving an Indian tribe and non-Indians. Under *Montana*, the Fallon Tribal Court lacks subject matter jurisdiction over Hicks's civil actions because in *Pease* we rejected the proposition that *Montana* is limited to cases involving fee lands owned by non-Indians. As there is no consensual relationship between the Tribe and Nevada law enforcement officials, and subjecting them to suit in tribal court is not necessary to protect the tribes or their members, neither of the *Montana* exceptions to this rule is applicable. As the district court held otherwise, I would reverse.

Along with *Strate v. A-1 Contractors, 520 U.S. 438 (1997), Montana* is the leading opinion discussing tribal sovereignty over non-members of a tribe. In *Montana*, the Court noted that Indian tribes have lost many of the attributes of sovereignty and retain only limited powers, such as the power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *450 U.S. at 564.* As the Court explained, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation," unless the non-members have entered "consensual relationships" with the tribe or its members, or the conduct of the non-Indians on fee land "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id. at 564-66.*

Pease rejects the argument Hicks makes here, that *Montana* only imposes restrictions on a tribe's jurisdiction over fee lands owned by or aligned with non-Indians. In *Pease* we held that a tribal court lacked jurisdiction to entertain a civil action brought by a tribe member against Yellowstone County seeking to enjoin the County's imposition of state property taxes on his (Indian-owned)

reservation property. *96 F.3d at 1173-76.* Pease contended "that *Montana* does not apply to the County's action because *Montana* only imposed restriction on a tribe's jurisdiction over fee land owned by non-Indians." *Id. at 1174.* However, we were unpersuaded "because the issue presented here is whether the tribal court may assert jurisdiction over a non-Indian party (the County), and this court has called *Montana* 'the leading case on tribal civil jurisdiction over non-Indians.'" *Id.* (quoting *FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990)).* [**36] Applying *Montana* and finding neither exception triggered, we upheld summary judgment for the County. As *Pease* is the law of this circuit, we are bound by its directive to apply *Montana* to decide "whether the tribal court may assert jurisdiction over a non-Indian party . . . ." *96 F.3d at 1174. See also* William C. Canby, Jr., American Indian Law 193 (3d ed. 1998) ("The Eighth Circuit, in the decision that the Supreme Court reviewed in *Strate*, and the Ninth [*1033] Circuit have both stated that the tribe's sovereign powers simply do not permit exercise of jurisdiction over nonmembers unless tribal interests are affected, so as to bring the exercise within one of the two *Montana* exceptions." (citing *A-1 Contractors v. Strate, 76 F.3d 930, 939 (8th Cir. 1996)* (en banc) and *Pease, 96 F.3d at 1175-76)).*

Strate further bolsters this view. *Strate* called *Montana* "the pathmarking case concerning tribal civil authority over nonmembers," and reiterated that *Montana* "establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances. " *520 U.S. at 445.* Although *Strate*'s holding that a tribal court lacks jurisdiction over a tort action against a non-member who had an accident with a tribe member on a state right-of-way running through a reservation appears to turn on the fact that the accident there occurred on the state's easement (thus not on Indian land, but on land "aligned" with non-Indians), the Court unambiguously makes *Montana* the relevant law. Finally, even if *Strate* may be construed to signal that *Montana* does not apply to conduct by non-Indians on Indian land, the Court did not expressly say so and until *it* does, we must continue to follow *Pease* and apply *Montana.*

County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) (en banc), also supports the conclusion that there is no tribal civil jurisdiction in this case. In *Allen*, we held that the Nez Perce tribe lacked civil jurisdiction over a member's § 1983 action (very similar to Hicks's action here) against Lewis County, the sheriff and a deputy sheriff because the tribe ceded its right "to exclude state officials engaged in law enforcement activities on the reservation." *Id. at 514.* The Nez Perce had entered into an agreement with Lewis County giving its officers the authority to enter the reservation, investigate minor crimes and make arrests. *See id.* Applying *Strate* and *Montana*, we concluded that "it does not matter how the land was owned because the [tribe's] consent to criminal jurisdiction was tantamount to alienation of the land to non-Indians for this limited purpose." *Id.* We then determined that neither *Montana* exception properly applied to extend tribal jurisdiction over the case. *See id. at 515-16.*

In Hicks's action, Spencer, Ellington and Fitzmorris had obtained Fallon Tribal Court permission to execute the search warrant of Hicks's residence (Spencer receiving permission twice), and thus they had a right to be on the reservation that was no less absolute than Deputy Myers's right in *Allen* and the non-member defendants' in *Strate*. The fact that the Fallon Paiute-Shoshone Tribe granted permission to Nevada law enforcement personnel to come onto the reservation on a case-by-case basis instead of in a blanket agreement does not materially change the analysis. Just as the Nez Perce formally consented to Deputy Myers's presence on their reservation through a prior agreement establishing concurrent criminal jurisdiction within the reservation, *see Allen, 163 F.3d at 514,* the Fallon Paiute-Shoshone formally consented to the presence of Spencer, Ellington and Fitzmorris on their reservation through the Fallon Tribal Court's express approval of their search warrants.

So, the Fallon Tribal Court's consent to execution of the Nevada search warrants "aligned" Hicks's property, albeit temporarily, with the state of Nevada. The Tribe had surrendered its right to exclude Spencer, Ellington and Fitzmorris (at least for the time being), giving them the unqualified right to be on Hicks's property. This case is thus indistinguishable from *Allen* in all material respects. Therefore, I would apply *Montana* and *Allen* and hold that Spencer, Ellington and Fitzmorris's conduct did not

imperil the tribe's power to control its internal affairs, and no applicable exception exists. Spencer only sought to execute the search warrants after obtaining the tribe's consent and assistance.

Accordingly, I would reverse and hold that the tribal court lacks subject matter jurisdiction to entertain Hicks's civil rights actions against the Nevada officials. n1

---

n1 For this reason I do not reach the immunity issues.

FOOTNOTES TO APP. A

n1 The district court determined that "the parties have *proceeded* as if the federal civil rights claim alleged is a § 1983 claim for a fourth amendment violation," and assumed for the purposes of the motions before it that a § 1983 claim was alleged. The district court also assumed that the tribal civil rights claims were alleged under ICRA.

n2 The Tribe waived the sovereign immunity of the Fallon Tribal Court and of the tribal judge, Judge Van Walraven, for the limited purpose of defending against Nevada's claims in federal court. Judge Van Walraven issued orders staying each of Hicks' actions pending final resolution of the issue of tribal jurisdiction in federal court.

n3 Nevada asserts before this court that it does not appeal this issue.

n4 *Montana v. United States* involved tribal regulation of hunting and fishing by non-Indians in a river running through the reservation. *450 U.S. at 547.* As a general matter, the Court stated that "the Tribe may prohibit nonmembers from hunting and fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." *Id. at 557.* But, upon finding that the title to the riverbed had passed to the State of Montana, the Supreme Court held that the tribal court lacked jurisdiction. *Id. 566-67.*

In so ruling, the Court articulated a "general proposition" that, on non-Indian owned fee lands, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," with two exceptions: 1) "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements"; and 2) "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id. at 565-66.* Although *Montana* involved only tribal regulation, *Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997)* extended *Montana*'s

principles to tribal court jurisdiction as well. Examining claims that arose from an accident on a stretch of highway across tribal reservation lands, the court stressed the status of that land, which was maintained by the State of North Dakota under a federally granted right-of-way. The federal grant meant that the land was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id., at 454.* Because of this equivalence to non-Indian owned land, the *Montana* rule applied, and the tribe lacked civil authority over the claims.

n5 The first exception, the Court explained, did not apply, despite the fact that A-1 Contractors had a "consensual relationship" with the Tribe through subcontract on the reservation, because the driver of the car was not a party to the subcontract and unaffiliated with the Tribe. *Id. at 457.* The Court also found the second exception inapplicable, stating that "neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id. at 459* (quoting *Williams v. Lee, 358 U.S. 217, 220, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)).* As a result, the Court held that the tribal court lacked jurisdiction to hear the case. *Id.*

n6 In her dissent, Judge Rymer relies on Judge Canby's discussion of *Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996)* (holding that tribal court lacked jurisdiction over challenge to county taxation of fee lands within reservation) for the proposition that unless one of the *Montana* exceptions apply, tribal courts do not have jurisdiction over nonmembers. *See* dissent at 657. Judge Canby's discussion, however, emphasizes the fact that *Yellowstone County* was decided before the Supreme Court's decision in *Strate*, and that *Pease* involved claims against nonmembers that arose *outside* the reservation. *See, e.g.*, William C. Canby, Jr., *American Indian Law* 193-195 (1998). *Pease*, therefore, is inapposite here.

n7 It is undisputed that Hicks' residence lies within the Reservation on an allotment held in trust for him by the federal government. Allotments are former tribally held lands that were divided by order of Congress in 1887 into small farm-sized tracts to be held by individuals. *See* Canby, at 270 (1988). For jurisdictional purposes, allotments are considered "Indian country." *See 18 U.S.C. § 1151; see also Oklahoma Tax Comm'n v. Sac and Fox Nation,*

508 U.S. 114, 123, 124 L. Ed. 2d 30, 113 S. Ct. 1985 (1993) (holding that trust allotments are "Indian country" and the equivalent of tribal land for jurisdictional purposes); *DeCoteau v. District County Court, 420 U.S. 425, 427 n.2, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975)* ("While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.").

n8 In fact, the tribal court amended the state court's warrant of August 30, 1990, and restricted its scope "to exterior premises only and to vehicles thereon . . . ."

n9 Though all of the land at issue in *Brendale* was non-Indian fee land, some of the land was within the "closed" portion of the reservation to which the tribe would limit access. Three justices would have found the tribe had inherent authority to zone all reservation land. Four justices would have found no authority under *Montana* to zone non-Indian fee land whether or not the tribe controlled access to the land. Justices Stevens and O'Connor, the deciding votes, held the zoning power of the tribe depends on its ability to control access to the land.

n10 The Supreme Court denied certiorari in *Namen* over the dissent of Justices Rehnquist and White, who hinted that they believed the tribes had no regulatory authority over non-members even when acting on Indian land. *See 459 U.S. 977, 978-79, 103 S. Ct. 314, 74 L. Ed. 2d 291 (1982)* (Rehnquist, C.J. and White, J., dissenting from denial of certiorari).

n11 We note that attempting to enforce the state's criminal laws against a tribal member on the Reservation directly implicates the sovereignty of the Tribe. *See Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003, 24 L. Ed. 2d 494, 90 S. Ct. 551 (1970)* (holding that the arrest of a Navajo Indian on the reservation for extradition pursuant to Arizona law to another state "would clearly interfere with rights essential to the Navajo's self-government") (citing *Williams v. Lee, 358 U.S. 217, 220, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)); see also Strate v. A-1 Contractors, 520 U.S. at 459 (1997)* (recognizing an exception to the *Montana* rule "to preserve 'the right of reservati Indians to make their own laws and be ruled by them'" (quoting *Williams, 358 U.S. at 220)).

n12 Sovereign immunity has been treated by this court as an affirmative defense, "whatever its jurisdictional attributes." *ITSI TV Productions, Inc. v. Agricultural Associations, 3 F.3d 1289, 1291 (9th Cir. 1993).* Thus, the defense is subject to our tribal court exhaustion rule, even though the issues the defense presents are jurisdictional in nature. Indeed, this court has held that "Eleventh Amendment immunity . . . does not implicate a federal court's jurisdiction in any ordinary sense." *Id.* Instead, this kind of immunity is raised and argued by the party seeking its benefit. Such arguments should be heard and decided in the first instance by the Tribal court.

n13 The tribal court's ruling cited here was issued on May 5, 1993. The tribal court granted the plaintiff's motion to dismiss the State of Nevada and all state defendants named in their official capacity on October 10, 1995.

n14 For example, the Court explained that "we do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of opportunity to challenge the court's jurisdiction." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985).* Most recently, the Court found that the "unusual preemption provision" of the Price Anderson Act which expressed Congress' "unmistakable preference for a federal forum, at the behest of a defending party," made tribal court exhaustion of the question of tribal court jurisdiction inappropriate. *El Paso, 526 U.S. 473, 119 S. Ct. 1430, 1437, 143 L. Ed. 2d 635 (1999).*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

State of Nevada, William Molini, Administrator for Nevada Division of Wildlife and Michael C. Spencer, Rich Ellington, and Bill Fitzmorris, as Nevada State Wildlife Wardens and Individually,

Plaintiffs,

vs.

Floyd Hicks, Tribal Court in and for the Fallon Paiute-Shoshone Tribes, Honorable Joseph Van Walraven,

Defendants.

_____/

Case No. CV-N-94-351-DWH

Judge: David W. Hagen

September 30, 1996, Decided
September 30, 1996, FILED; October 1, 1996, ENTERED & SERVED

DISPOSITION:
Plaintiffs' motion for summary judgment (# 33) DENIED. Floyd Hicks' and tribal defendants' motions for summary judgment (# # 34, 35) GRANTED.

OPINION:

MEMORANDUM DECISION AND ORDER

Before the court are the parties' cross-motions for summary judgment (# # 33, 34, 35) n1. For the reasons stated below, plaintiffs' motion for summary judgment (# 33) is denied. Floyd

Hicks's and the tribal defendants' motions for summary judgment (# # 34, 35) are granted.

Background: Facts n2 Leading To The Underlying Litigation

In August 1990, Michael Spencer, a state game warden, applied to the New River Justice Court in Fallon, Nevada for a search warrant to search the premises of Floyd Hicks, a resident of the Fallon-Paiute Shoshone reservation.

Spencer's affidavit averred the purpose of the warrant was to obtain evidence of Possessing or Killing a Big Horn Sheep, in violation of N.R.S. 501.376, a gross misdemeanor. The affidavit also stated: (1) in January of 1989, a confidential informant advised Spencer, a state game warden, that in June of 1988 he saw two dead big horn sheep in the back of a pickup truck owned by Floyd Hicks; (2) the confidential informant also advised that Hicks admitted to possessing the sheep and planning to take them to a taxidermist in Fallon; (3) at 1:00 p.m. on August 30, 1990, Spencer was advised by a special agent of the federal Bureau of Land Management that on August 29, 1990, the agent had observed one big horn sheep head protruding from the trunk of a vehicle on Mr. Hicks's premises; (4) Spencer personally observed a big horn sheep head protruding from a vehicle on Hicks's premises; and (5) no person by the name of Hicks had a current state permit, or "tag", to take big horn sheep.

On August 30, 1990, Spencer received a search warrant from the New River Justice Court to search the residence of Floyd Hicks, a tribal member, apparently on the basis of the January 1989 affidavit. The warrant provided that the issuing court lacked jurisdiction over the Fallon-Paiute Shoshone reservation and that the warrant was valid only if approved by the Fallon Tribal Court. At all relevant times, Hicks resided on his allotted land within the boundaries of the Fallon Paiute-Shoshone Colony and Reservation.

On August 30, 1990, Mr. Spencer sought Tribal Court approval for the warrant to be executed on the reservation. The Tribal Court, Judge Harold presiding, approved the warrant, and modified it to limit the search to the "exterior premises and any vehicles thereon." The warrant was executed on August 30, 1990. One or more mounted big horn sheep heads were removed from Hicks's residence. It was ultimately determined the trophies were not

evidence of any crime or game hunting violation, and they were returned to Hicks.

On June 12, 1991, Spencer again applied for and received a search warrant. This warrant was executed that same day. Spencer was accompanied by tribal police officers at the time he executed both warrants. One or more mounted bighorn sheep heads were removed from Hicks's residence. Once again, it was ultimately determined the trophies were not evidence of any crime or game hunting violation, and they were returned to Hicks.

Disputed Issues in the Underlying Litigation

Disputed issues in the underlying litigation include, but are not limited to, the facial sufficiency of the affidavits supporting the state search warrant applications, the validity of the search warrants themselves, the legality of the tribal court orders authorizing execution of the state warrants, the reasonableness of the game wardens in relying on those orders, the reasonableness of the searches, and the reasonableness of the seizure of property belonging to Hicks.

Procedural Background

Plaintiffs brought this action to enjoin prosecution of two civil actions in Fallon Tribal Court against the State of Nevada, William Molini, Administrator for Nevada Division of Wildlife, and Michael C. Spencer, Rich Ellington, and Bill Fitzmorris, as Nevada State Wildlife Wardens and individually. Plaintiffs seek a declaration that the Fallon Tribal Court may not exercise jurisdiction over the State of Nevada and its officers and employees, whether in their official or individual capacities.

Hicks filed the two actions at issue here in Fallon Tribal Court; one, FT 91-034, on July 8, 1991; the other, FT 92-031, on June 22, 1992. The complaints alleged a variety of claims, including claims under the Indian Civil Rights Act, *25 U.S.C. § 1302,* wrongful civil proceedings, unreasonable search and seizure, trespass to land, trespass to chattels, abuse of process, and infliction of emotional distress. By amended complaint, Hicks also claimed violation of unspecified federal and tribal civil rights. The parties have proceeded as if the federal civil rights claim alleged is a § 1983 claim for a fourth amendment violation, and for the purposes of the motions before the court, the court assumes a § 1983 claim is

included. Presumably, the tribal civil rights claims are asserted under ICRA.

Hicks originally attempted service by certified mail. The defendants moved to quash service of process on the grounds of state sovereign immunity, limited immunity, and defective service. On May 3, 1993, the tribal court, Judge Van Walraven presiding, ruled that it was adopting NRCP 4 for the duration of the Hicks litigation. On May 5, 1993, the court recognized plaintiffs' ineffective service argument and quashed service of process upon the state defendants. On May 21, 1993, the court authorized service by publication. Mr. Hicks published. The state then renewed its motion to quash and on February 2, 1994, the court again quashed service. The Intertribal Appellate Court, in a May 13, 1994, decision, reversed and remanded to the Fallon Tribal Court for trial. On June 1, 1994, plaintiffs filed this action in federal court.

On June 16, 1994, Judge Van Walraven issued orders staying each of Hicks's actions pending final resolution of the issue of tribal jurisdiction in federal court. Because the stay orders effectively mooted plaintiffs' motion in this court for preliminary injunction, on June 20, 1994, plaintiffs stipulated to voluntary withdrawal of that motion, and this court entered an order to that effect (# 18).

The Tribe, via resolution of the Fallon Business Council, has waived the sovereign immunity of the tribal defendants, i.e., the Tribal Court and Judge Walraven, for the limited purpose of defending, in this federal court action, plaintiffs' claims for declaratory relief regarding the issue of tribal court jurisdiction. Fallon Business Council Resolution No. 94-F-074.

The state defendants, the tribal defendants, and Floyd Hicks have each moved for summary judgment on the issue of the tribal court's jurisdiction over the state defendants under federal law. (# 33, 34, 35). Pursuant to agreement of all parties, this case is presented to the court on cross-motions for summary judgment. On October 10, 1995, the Tribal Court granted plaintiff's motions to voluntarily dismiss the state defendants in their official capacities from FT 91-034 and FT 92-031. This court ruled (# 55) that these dismissal orders of the Tribal Court have mooted the issue of tribal court jurisdiction over the state defendants in their official capacities n3.

Oral argument on the summary judgment motions was presented to the court on October 16, 1995, and the motions were submitted on that date. On March 29, 1996, the court issued an order (# 55) denying, without prejudice, all three motions for summary judgment (# # 33, 34, 35) and ordering supplemental briefing. The order specified that submission of supplemental briefs would be deemed a renewal of the summary judgment motions. Each party has submitted supplemental briefs and the motions (# # 33, 34, 35) are deemed renewed and ripe for decision.

Personal Jurisdiction Over State Defendants in Their Individual Capacities: Due Process and the Question of Service

Any question regarding tribal court jurisdiction over the state defendants in their official capacity is moot. *See* (# 55); *see also supra* note 3. Therefore, the court will only address those arguments made by the parties with reference to the individual capacity claims.

As a preliminary matter, the court agrees with the analysis of the Intertribal Court of Appeals on the issue of service of process n4. The Intertribal Court identified the issue as one of federal constitutional due process, and reversed the order quashing service on the grounds that service was in accordance with tribal law as adopted by Judge Van Walraven n5, and that *Mullane's* due process notice requirement was satisfied. *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950).*

The Intertribal Court found service by publication to be proper and effective under both tribal and federal constitutional law. The court reasoned that Judge Van Walraven was authorized by the tribal code to adopt provisions of NRCP as a guide, he had in fact adopted NRCP 4 in the Hicks case, he had judicial power to interpret tribal law as codified in the Law and Order Code and as adopted pursuant to the Code in his court, and the Nevada courts' interpretations of NRCP 4 are not binding on the tribal court because the "meld" of adopted Nevada procedural rule in combination with the Law and Order Code and other sources of tribal law produces a unique and valid result. The court further held that Judge Van Walraven's order adopting NRCP 4 was not subject to post-hoc oral modification after Hicks relied on it n6.

Plaintiffs have not persuaded this court that the Intertribal Court of Appeals decided this issue erroneously. This court defers to

tribal court determinations of tribal law unless they implicate substantial federal questions. *Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994), cert. denied, 130 L. Ed. 2d 398, 115 S. Ct. 485 (1994).* The only substantial federal question implicated in the court's ruling on service is that of due process. The Intertribal Appeals Court decided this issue correctly. In the leading case on due process in the service context, *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court stated,

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance. But if due respect for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. *339 U.S. 306, 314-15 (1950).*

The "practicalities and peculiarities" of this case include the following: the complaint in CV-FT-034 was stamped "service made and accepted this 16th day of July 1991" and signed by Sherry Porter, Deputy Attorney General; the individual defendants were initially served by certified mail sent out by the court itself; the defendants had actual notice as evidenced by their special appearance to quash service; and service by publication was expressly authorized by the tribal court. No reasonable argument can be made that on the facts in this case, defendants did not receive notice reasonably calculated to apprise them of the action and give them an opportunity to be heard, that they were not afforded reasonable time to make an appearance, or that necessary information was not conveyed. The court finds that service met with the constitutional due process requirements of *Mullane*.

Furthermore, the court finds that by executing the search warrant on the premises of Hicks's allotment n7, the individual game warden defendants purposefully availed themselves of the privilege of conducting activities within the exterior boundaries of the reservation and on tribal land. *See Hanson v. Denckla, 357 U.S.*

235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). See also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power . . . to place conditions on entry, on continuous presence, or on reservation conduct . . . A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power."). Clearly, the dispute arises out of those contacts. Thus, as a matter of due process, the court finds the exercise of personal jurisdiction to comport with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).*

Exhaustion of Tribal Remedies

In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians* n8, the Court held that "the question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the jurisdiction of a tribal court is one that must be answered by reference to federal law." *471 U.S. 845, 852 (1985).* However, the Court, emphasizing the Congressional "policy of supporting tribal self-government and self-determination", the desirability of developing a full record prior to federal review, and the goal of enhancing the legitimacy of tribal courts, required exhaustion of tribal court remedies before a federal court could hear a challenge to "either the merits or any question concerning appropriate relief." *Id., 856.*

In *Iowa Mutual Insurance Co. v. LaPlante* n9, citing *Merrion v. Jicarilla Apache Tribe* n10, the Court emphasized that a tribe retains all the inherent attributes of sovereignty not previously invalidated by federal law. The Court stated, "civil jurisdiction over [activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *480 U.S. 9, 18 (1987).*

National Farmers and *Iowa Mutual* "place a strict premium on precise and rigorous tribal court analysis of its own jurisdictional parameters." Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction, 31 Ariz. L. Rev. 329, 331 (1989).* The crucial questions for the tribal court are (1) whether the tribal court is empowered by tribal law to hear a particular kind of case; and (2) whether tribal court authority is limited by federal

law. The Court in *National Farmers* described the necessary analysis as requiring "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers, 471 U.S. 845, 855-56, 85 L. Ed. 2d 818, 105 S. Ct. 2447.*

Thus, the extent to which tribal law authorizes jurisdiction is a question which should be answered by the tribal court in the first instance. In this case, the Intertribal Court of Appeals definitively answered this question. While admittedly the Court did not memorialize its reasoning in the historical depth and legal detail contemplated by *National Farmers*, the parties have exhausted their tribal remedies and the matter is now properly before this court.

Tribal Civil Adjudicatory Jurisdiction, Generally

The contours of tribal civil adjudicatory jurisdiction over in Indian country are unclear for several reasons. No federal statutes provide guidance. The federal caselaw, while clearly mandating exhaustion of tribal remedies in the first instance, "fails to establish clear-cut guidelines for deciding in what circumstances tribal court jurisdiction is appropriate." Pommersheim, 331. However, the Supreme Court's opinions as far back as *Worcester v. Georgia* n11 suggest that, in contrast to criminal jurisdiction, which the Court views as purely membership-based, tribal court civil jurisdiction has a strong geographic component n12. The Ninth Circuit explicitly recognized this principle in *United States v. Plainbull*, stating "tribal courts are appropriate forums for the exclusive adjudication of disputes taking place within the boundaries of a reservation." *957 F.2d 724, 727 (9th Cir. 1992)* n13.

Felix Cohen, an oft-cited expert on federal Indian law, has described the backdrop against which the tribal jurisdiction analysis is conducted as follows:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by an adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the power of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of the sovereignty of the tribe, e.g., its power to enter into treaties with foreign

> nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

F. Cohen, Handbook of Federal Indian Law 123 (1942 ed.).

The continuing application of these overriding principles is readily gleaned from subsequent Supreme Court caselaw. In *Williams v. Lee*, a suit brought against a Navajo defendant by a non-Indian owner of a store on the Navajo reservation, the Court held that the state court lacked jurisdiction over the dispute. *358 U.S. 217 (1959).* The Court reasoned that allowing state court jurisdiction over disputes arising on the reservation and involving significant tribal interests would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe upon the right of the Indians to govern themselves." *Id., 223.*

In *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978),* the Court held the Indian Civil Rights Act (ICRA) does not provide a civil cause of action in federal court n14, reasoning that because "tribal forums are available to vindicate rights created by the ICRA", an implied federal right of action was unnecessary. The Court cited *William v. Lee* for the proposition that "tribal courts have been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property rights of both Indians and non-Indians." *Id., 66.*

Jurisdiction Over State Defendants In This Case

Here, the tribal court has asserted jurisdiction, and the Intertribal Court of Appeals has affirmed. A tribal court's interpretation of tribal law is binding on this court. *Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir.1994).* However, the extent of tribal court jurisdiction is a federal question. *National Farmers, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985). Hinshaw* precludes a federal court from second-guessing a tribal court's own reading of tribal law, while *National Farmers* reserves the ultimate decision on tribal jurisdiction to federal courts. These two principles require federal courts to determine *de novo* whether the tribal court has asserted its jurisdiction beyond lawful limits; the applicable limits are those set by federal law. *National Farmers, 471 U.S. 845, 85 L.*

Ed. 2d 818, 105 S. Ct. 2447 (1985). Thus, the questions for this court are whether the Intertribal Court of Appeals erred, as a matter of federal Indian law, in holding that the tribal court properly exercised jurisdiction over the underlying litigation in the first instance.

Montana v. United States, the Presumption of Retained Sovereignty, and the Rule of Implicit Divestiture

Defendants argue that because the underlying events occurred on tribal territory, this court must presume the tribe possesses inherent sovereign jurisdiction until plaintiffs rebut the presumption with a showing of express divestiture by Congress; they further argue that plaintiffs have not and cannot make that showing. In contrast, plaintiffs argue the presumption urged by defendants does not apply because under *Montana v. United States*, the power of civil adjudication over a person not a member of the tribe has been implicitly divested as inconsistent with the tribe's status as a domestic dependent nation. The resolution of this dispute requires an examination of the nature and applicability of the Supreme Court's holding in *Montana v. United States. 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981).*

In *Montana*, the Supreme Court held the dependent status of Indian tribes implicitly divested them of power to regulate the conduct of non-members on fee land no longer owned by the tribe. However, the opinion carefully reiterated that tribes retain significant civil jurisdiction over non-Indians on their reservations:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe. *Id.*

Although *Montana* recognized the existence of retained n15 sovereignty, it appeared to sharply curtail the scope of that sovereignty. The Court set forth a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" and further stated that tribal sovereignty over nonmembers "cannot survive without express

congressional delegation." *450 U.S. at 564.* This broad language seemed to inexplicably reverse the traditional presumption set forth in *Williams v. Lee*, which stated "this court has consistently guarded the authority of Indian governments over their reservations . . . if this power is to be taken away from them, it is for Congress to do it." *358 U.S. 217, 222 (1959).* In other words, whereas *Williams* presumes tribal power unless divested n16, *Montana* appears to presume power over nonmembers has been lost, unless one of the two specified exceptions applies.

No Supreme Court case explains the reversal of the *Williams* presumption, and post-Montana cases have followed the *Montana* rule inconsistently, if at all. An opinion handed down shortly before *Montana, Washington v. Confederated Tribes of the Colville Indian Reservation*, stated "tribal powers are not implicitly divested by virtue of the tribes' dependent status." *447 U.S. 134, 153-154 (1980).* In a case decided one year after the *Montana* decision, *Merrion v. Jicarilla Apache Tribe*, the Court, expressly rejecting an implicit divestiture argument, held that the power to impose a severance tax on oil and gas extracted from tribal lands by nonmember lessees was inherent in the tribe's power as a sovereign nation. *455 U.S. 130, 144, 149-150 (1982). National Farmers* and *Iowa Mutual*, both post-Montana cases, reiterate the presumption of retained sovereignty, without any attempt to reconcile these formulations with Montana's apparent reversal of the *Williams* presumption. However, more recent cases have returned to *Montana. See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 425, 106 L. Ed. 2d 343, 109 S. Ct. 2994 (1989); South Dakota v. Bourland, 508 U.S. 679, 113 S. Ct. 2309, 2315 n.6, 124 L. Ed. 2d 606 (1993).*

Because *Montana, Brendale*, and *Bourland* involved challenges to a tribe's power to regulate, and *National Farmers* and *Iowa Mutual* involved challenges to a tribe's power to adjudicate tort claims against a non-member, the different formulations of the "general rule" may be a result of the Supreme Court's implicit recognition of a principled distinction between tribal adjudicatory jurisdiction and tribal regulatory jurisdiction n17. The Ninth Circuit made this distinction in its *National Farmers* opinion, but the Supreme Court did not address it. *Compare National Farmers Union Ins. v. Crow Tribe, 736 F.2d 1320, 1321 n.3, 1323 and n.4*

(9th Cir. 1984) with National Farmers Union Ins. v. Crow Tribe, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985). Several commentators have argued persuasively that a distinction between tribal regulatory and adjudicatory jurisdiction has been reflected, albeit implicitly, in the Supreme Court's opinions n18. The recognition of this distinction would resolve the apparent inconsistency between the Supreme Court's formulation of the rule in *National Farmer's* and *Iowa Mutual*, which trumpeted a vital presumption of retained jurisdiction unless a challenger proved divestment, and the arguably narrower *Montana* view of sovereignty.

Yellowstone County v. Pease

In *Yellowstone County v. Pease* n19, the Ninth Circuit cited with approval a portion of the Eighth Circuit's *en banc* opinion in *A-1 Contractors v. Strate* n20, integrating the *Montana* rule with the presumption of retained sovereignty as reiterated in *Iowa Mutual* and other cases, into one coherent rule:

A valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a . . . nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the . . . nonmember unless that jurisdiction is affirmatively limited by federal law. *Pease, 1996 WL 512363, 512366* (9th Cir.), quoting from *A-1 Contractors, 76 F.3d 930, 938-39 (8th Cir. 1996)* (*en banc*).

Montana

If the rule in *A-1 Contractors* is now indeed the law of the Ninth Circuit, it certainly provides [**29] a helpful framework. However, it does not significantly alter this court's analysis in this case. Under either the *A-1 Contractors* formulation or under *Montana*, the court finds tribal jurisdiction properly asserted. Assuming, *arguendo*, the *Montana* rule controls, the court finds *Montana* does not preclude tribal jurisdiction in this case.

As a threshold matter, the court notes that the *Montana* decision involved the tribe's jurisdiction over fee lands within reservation boundaries. A finding of implicit divestiture of tribal authority over conduct occurring on land no longer owned by the tribe n21 and which has not been demonstrated to "threaten or have some direct effect on the political integrity, the economic security, or the health

and welfare of the tribe" has limited application to the issue presented here.

Providing a forum for reservation-based tort actions, even where constitutional torts are alleged, falls within both *Montana* exceptions. Mr. Hicks, a member of the Tribe, has alleged his federal civil rights were violated on tribal land. The tribal code provides for jurisdiction over all civil causes of action arising within the territorial jurisdiction of the court, and specifies that entry upon such territory constitutes consent to the jurisdiction of the court. Furthermore, tribal law provided very specific restrictions on the execution of extraterritorial search warrants on the reservation. These tribal law provisions are directly applicable to the facts in this case and clearly show that the tribe viewed the execution of state search warrants on the reservation as bearing directly on the political integrity of the tribe. *See Montana, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981).* By enacting such provisions, the tribe has asserted its interest in adjudicating such disputes.

Even without tribal statutory law in this area, this court would presume that the Tribe has an interest in providing Mr. Hicks, and any other tribal member similarly situated, a forum in which to vindicate these rights. As recognized by the Supreme Court in *National Farmers*, tribal self-government and self-determination are inextricably linked to the continuing enhancement of the legitimacy of the tribal courts. *471 U.S. 845, 856 (1985).* Furthermore, the tribal courts' legitimacy should not be measured solely by how closely it approximates the operation of the federal courts n22, or how exactly its adjudications correspond with federal or state caselaw. "If the word "sovereign" has any meaning in contemporary federal courts' jurisprudence, its meaning comes from a state's or tribe's ability to maintain different modes from the federal government." Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U.Chi. L.Rev. 671, 749 (1989).* Tribal courts must be permitted to be "jurisgenerative" if they are to thrive. *See id., 751* (citing Robert Cover, *Nomos and Narrative, 97 Harv.L.Rev. 4, 28).* "If justice is a product of conversation rather than unilateral declaration, it is more likely to be achieved in the context of respectful dialogue rather than

majoritarian conclusions about the 'other'." Frank Pommersheim, *Braid of Feathers* 193 (1995).

Although the issue presented here is one of first impression, the court is satisfied that this ruling is consistent with the federal caselaw. Ninth Circuit law has not found *Montana* to restrict tribes' adjudicatory jurisdiction over non-members. To the contrary, the Ninth Circuit cases reaffirm the concept of retained sovereignty as restated in *Iowa Mutual* and *National Farmers. See, e.g., Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), cert. denied, 499 U.S. 943, 113 L. Ed. 2d 459, 111 S. Ct. 1404 (1991); Wellman v. Chevron, 815 F.2d 577 (9th Cir. 1987); Yellowstone County v. Pease, 1996 WL 512363* (9th Cir.).

The presence of federal law issues in the tribal court litigation does not compel the conclusion that tribal court jurisdiction may not lie. *See Middlemist v. Lujan, 824 F. Supp. 940 (D.Mont.1993), aff'd without opinion, 19 F.3d 1318 (9th Cir. 1994), cert. denied, 115 S. Ct. 420 (1994). See also Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1986)* ("Unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."); *Altheimer & Gray v. Sioux Mfg. Co., 983 F.2d 803, 814 (7th Cir. 1993), cert. denied, 510 U.S. 1019, 114 S. Ct. 621, 126 L. Ed. 2d 585 (1993)* ("[a] tribal court, presumably, is as competent to interpret federal law as it is state law"). Nor does the non-Indian status of the defendant. *Williams v. Lee, 358 U.S. 217, 223, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)* ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations . . . If this power is to be taken away from them, it is for Congress to do it."); *Hinshaw v. Mahler; see also Cardin v. Cruz, 671 F.2d 363, 366 (9th Cir. 1982), cert. denied, 459 U.S. 967, 74 L. Ed. 2d 277, 103 S. Ct. 293 (9182)* (to hold otherwise would "reduce to a nullity the Supreme Court's repeated assertions that Indian tribes retain attributes of sovereignty over their territory, not just their members" [internal citations omitted]).

Nor does the status of the state defendants as state actors argue persuasively against jurisdiction. The Supreme Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory", *United States v. Mazurie* n23, and that "tribal sovereignty is dependent on, and subordinate to, only the federal government, not the States." *Washington Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980).*

Conclusion

Mr. Hicks seeks a remedy for the violation of his constitutional and common law rights. He chose to seek those remedies in the Fallon Tribal Court. The Tribal Court has asserted jurisdiction over his lawsuit. State defendants point to no law, statutory or decisional, which persuades this court he cannot proceed in tribal court.

As the Supreme Court has clearly stated, it is not the role of the federal courts to abrogate tribal sovereignty n24. Both *National Farmers* and *Iowa Mutual* contemplated post-exhaustion federal court review of tribal jurisdictional holdings. This court reads that mandate conservatively; in the court's view, the task before it is to evaluate the tribal court's assertion of jurisdiction in light of federal Indian law as it stands today, not to create new federal common law further restricting tribal jurisdiction. The presumption is in favor of tribal court jurisdiction. *Iowa Mutual, 480 U.S. 9, 18, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1986).* Implicit divestiture will not be found unless "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government n25", as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or [criminally] prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-154, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980).*

This court has found valid tribal interests to be at issue. *See Yellowstone County v. Pease, 1996 WL 512363, 512366* (9th Cir.) (citing *A-1 Contractors v. Strate, 76 F.3d at 938-39 (8th Cir.1996) (en banc)*. Plaintiffs have failed to prove the jurisdiction asserted by the tribe is affirmatively limited by federal law. No express congressional divestment of the tribe's presumed inherent

jurisdiction, or "an overriding federal interest that would necessarily be frustrated" by the exercise of tribal jurisdiction, has been shown. *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 154 (1980).* Therefore, this court concludes that the Fallon Tribal Court has jurisdiction to adjudicate Hicks's claims against the state defendants in their individual capacities.

Qualified Immunity

Plaintiffs argue for summary judgment in favor of the state defendants in their individual capacities on several grounds. First, they argue that Hicks failed to make the requisite pleading and showing necessary to overcome the individuals' claims of qualified immunity as state officers and employees. They claim the issue was raised, argued and briefed in the tribal court proceedings, the tribal court failed to adequately address these arguments when they were presented, and erred as a matter of law by denying them immunity.

The tribal trial court held that qualified immunity did not serve as a jurisdictional bar, and the tribal appellate court affirmed. This court agrees. As a matter of federal law, qualified immunity is not a jurisdictional bar to suits against a state official in his individual capacity, but rather an affirmative defense. *See Harlow v. Fitzgerald, 457 U.S. 800, 815, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1991).* Therefore, the court affirms the Intertribal Appellate Court's ruling on qualified immunity as a jurisdictional issue.

To the extent that the parties dispute whether qualified immunity is available to the state defendants as a defense, the court finds that question was not exhausted in the tribal courts n26. While mindful of the policy reasons behind the general rule that issues of qualified immunity ordinarily be decided long before trial, *see Hunter v. Bryant, 502 U.S. 224, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991),* the court is unwilling to disregard the exhaustion rule to decide that issue. Although plaintiffs argue that the tribal court "implicitly" ruled on the defense, the court disagrees. The tribal court did not hold an evidentiary hearing or make definitive findings of fact or conclusions of law on the application of the qualified immunity defense to the facts of this case. The court held only that qualified immunity was not a jurisdictional bar to tribal court jurisdiction in the first instance. n27 Therefore, this court does not reach the issue of qualified immunity as a defense to the

underlying claims. *See Crawford v. Genuine Parts Co., 947 F.2d 1405, 1408 (9th Cir.1991), cert. denied, 502 U.S. 1096, 117 L. Ed. 2d 419, 112 S. Ct. 1174 (1991)* ("When the dispute is a reservation affair . . . there is no discretion not to defer n28").

Claims Against Molini

At oral argument, the court questioned whether Hicks states a claim against William Molini in his individual capacity, as it appeared no specific facts were alleged as to his personal participation in the allegedly unconstitutional and tortious acts of the wardens in obtaining and executing the search warrant and seizing Hicks's property.

The voluntary dismissal of the official capacity claims by the tribal court may well have made personal and subject-matter jurisdiction over Molini in CV-FT-034 n29 inappropriate. This issue was never before the tribal court because when the motion to quash rulings were made, claims against the state defendants in their official capacities had not yet been voluntarily dismissed. Therefore, the court declines to rule on whether a claim has been stated against Molini, leaving this unexhausted issue to the tribal court. *See Crawford, 947 F.2d 1405 (9th Cir. 1991).*

For the reasons set forth in this opinion, IT IS ORDERED that plaintiffs' motion for summary judgment (# 33) is DENIED. Floyd Hicks' and the tribal defendants' motions for summary judgment (# # 34, 35) are GRANTED.

DATED: September 30, 1996.

David W. Hagen
UNITED STATES DISTRICT JUDGE

FOOTNOTES TO APP. B

n1 In a March 29, 1996, order, these motions were denied without prejudice. The court's order provided that the filing of supplemental briefs ordered by the court would be deemed a renewal of the original summary judgment motions. All parties have filed supplemental briefs and the motions are now before the court.

n2 No evidentiary hearings were held before this court. These facts are gleaned from material in the record before the court and are given as background only; they are not intended to be this court's official findings of fact.

n3 Plaintiffs argued for summary judgment in favor of the state officials on the grounds of sovereign immunity. In light of *Nevada v. Hall, 440 U.S. 410, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979),* it is far from clear that sovereign immunity would provide a basis for summary judgment in plaintiffs' favor. However, this issue has been mooted by Hicks' voluntary dismissal of the official capacity claims against the state officials.

At oral argument, counsel for the State of Nevada cited *Native Village of Noatak v. Blanchard, 38 F.3d 1505 (9th Cir. 1994),* for the proposition that voluntary cessation of illegal conduct does not render moot a challenge to that activity. Thus, counsel argued, the court should reconsider its conclusion that the sovereign immunity issue is now moot. The court is unpersuaded. In Blanchard, a challenge to an Alaska statute was mooted by the statute's repeal. The case analyzed two exceptions to the mootness doctrine. One, "capable of repetition yet evading review", allows resolution of an otherwise moot legal issue when there is a reasonable likelihood that the plaintiff will again be subject to the same injury, and the injury suffered is of a type "inherently limited in duration such that it is always likely to become moot before federal court litigation is completed." *Id. at 1509.* The second exception to the mootness doctrine, "voluntary cessation", applies when a defendant voluntarily ceases improper conduct in response to a lawsuit but the plaintiff has a reasonable expectation that the illegal action will recur. *Id. at 1511.*

Neither of the two exceptions are applicable to this case. A suit brought in tribal court against the State of Nevada and state officials acting in their official capacities does not fall within the "capable of repetition yet evading review" exception because no likelihood of repeat litigation has been shown and such a suit is not inherently limited in duration such that it is always likely to become moot before federal court litigation is completed. Nor would such a suit fall within the "voluntary cessation" exception, as the state has made no showing of a reasonable expectation that the suit against the state defendants will be reinstated. The mere fear of a possible future injury is insufficient to invoke the "voluntary cessation" exception; "federal courts are not authorized to address such theoretical possibilities." *Id. at 1510.*

n4 Although the parties have not addressed themselves to the propriety of service in their arguments to this court, the court finds it necessary and appropriate to address it because it was one of the bases upon which the Intertribal Court found tribal jurisdiction.

n5 At a March 3, 1993 hearing on the first motion to quash, Judge Van Walraven noted that the jurisdictional provisions of the Fallon Tribes Law and Order Code did not provide for any specific method of service of process outside the exterior boundaries of the reservation. On March 4, 1993, Hicks petitioned the court for an order allowing service by publication. On May 5, 1993, Judge Van Walraven quashed service, stating, in part, "there being no proof of service on file showing that the Court's service of the specially appearing defendants was made on the Fallon Indian Reservation or Colony, or in accordance with Nevada Rules of Civil Procedure (NRCP), Rule 4, adopted by Tribal Law, service on the specially appearing State defendants by Certified U.S. Mail fails."

Pursuant to Fallon Tribes Law and Order Code § 1-30-040, tribal judges are empowered to use the Nevada Rules of Civil Procedure as a guide as long as such use does not "impede the administration of justice nor contravene the application of any Tribal law or custom of federal law nor to produce any absurd result nor impose any regulatory scheme or policy not contemplated by the Tribe nor to interfere with the Tribe's law or policies on any subject regulated by the Tribe." Although the May 5, 1993, order is somewhat ambiguous, the court's May 21, 1993, order clarifies that the court had adopted NRCP 4.

n6 Hicks also relied on the court's order allowing service by publication.

n7 These facts are adequately established by the record and are not disputed by the parties.

n8 *471 U.S. 845 (1985).* In *National Farmers*, a Crow Indian injured in a motorcycle accident in a school parking lot on fee land within the Crow Indian Reservation sued a state school district in tribal court. The school district's insurance company sought to collaterally attack a default judgment against it in federal court.

n9 *480 U.S. 9 (1987).*

n10 *455 U.S. 130 (1982).*

n11 *31 U.S. (6 Pet) 515, 556 (1832).* In this opinion, Chief Justice Marshall described the Indian tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive." The Supreme Court has since rejected this absolute rule of exclusive jurisdiction, *see Oliphant v. Suquahamish Tribe, 435 U.S. 191, 212, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978),* but territory remains a determining factor in many jurisdictional determinations.

n12 *See* Allison M. Dussias, *Geographically-Based and Membership Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision, 55 U.Pitt.L.Rev. 1 (1993); see also Williams v. Lee, 358 U.S. 217, 223, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)* ("[Respondent] was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations . . . If this power is to be taken away from them, it is for Congress to do it."; *Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987)* (Tribal jurisdiction over tribal territory exists unless specifically divested or diminished by Congress).

n13 The court, citing *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978), Williams v. Lee, 358 U.S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959),* and *Iowa Mutual v. LaPlante, 480 U.S. 1, 15 (1986),* stated, "deference to tribal courts with regard to tribal affairs is a fundamental tenet of federal jurisprudence." *Id.*, 728. The court referred once again to "activities occurring inside reservation boundaries" before

concluding "because the Plainbulls grazed their cattle on reservation land without obtaining a tribal permit", and "the alleged trespass was to tribal land", plaintiffs should have filed in tribal court. *Id.*

n14 The only federal remedy expressly made available under ICRA is the writ of habeas corpus.

n15 The Supreme Court recognizes adjudicatory jurisdiction as an element of "retained" sovereignty even though "tribal courts in the Anglo-American mold were [historically] virtually unknown". *See Iowa Mutual v. LaPlante, 480 U.S. 9, 17, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987).*

n16 *Williams v. Lee* recognized the authority of tribal courts over Reservation affairs involving nonmembers. *358 U.S. 217 (1959).* In *United States v. Wheeler*, the Court held that Indian tribes possessed those aspects of sovereignty not withdrawn by treaty, statute or by implication as a necessary result of their status as domestic dependent nations. *435 U.S. 313 (1978).* Later, in *Oliphant*, the Court utilized the new *Wheeler* doctrine of implicit divestiture, which severely eroded the *Williams v. Lee* presumption, to invalidate tribal criminal jurisdiction over nonmembers. *435 U.S. 191 (1978).* In *National Farmers*, the Supreme Court rejected the claim that implicit divestiture extends to civil adjudicatory jurisdiction over nonmembers. And, in *Iowa Mutual*, the Court, noting that Congress had never expressed an intent to limit the civil jurisdiction of the tribal courts, stated that jurisdiction is presumed unless affirmatively limited by treaty or federal statute.

n17 "[Regulatory, or legislative, jurisdiction] refers to the authority of a state to make its law applicable to persons or activities and is quite a separate matter from jurisdiction to adjudicate." *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 113 S. Ct. 2891, 2918, 125 L. Ed. 2d 612 (1993)* (Scalia, J., dissenting) (internal citations omitted).

n18 *See, e.g.*, Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction, 73 N.C.L.Rev. 1089, 1128-29, 1141-49 (1995).* Reynolds points out that federal courts have entertained challenges to tribal regulatory jurisdiction since *Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823),* but had not heard a challenge to a tribe's adjudicatory jurisdiction until *National Farmers* in 1985. In that

opinion, the Court announced the rule that all challenges to tribal jurisdiction, both regulatory and adjudicatory, are federal questions. *See also*, Joseph Singer, *Remembering What Hurts Us Most: A Critique of the American Indian Law Deskbook, 24 N.M.L.Rev. 315, 316-17, 325-27 (1994).* Professor Singer criticizes the *Deskbook*, a treatise by a group of Attorneys General from western states, for "advancing [the Attorneys General's] own political agenda by relying on the narrower view of sovereignty put forth in the legislative jurisdiction cases [*Montana, Brendale* and *Duro v. Reina*], while ignoring the Court's endorsement of tribal sovereignty as reflected in *National Farmers* and *Iowa Mutual*." Reynolds, *73 N.C.L.Rev. 1098, 1157 n.277.*

The Ninth Circuit has recently expressed skepticism about the existence of an adjudicatory/regulatory distinction. *See Yellowstone County v. Pease, 1996 WL 512363, 512366* (9th Cir.). However, the court previously recognized the distinction in *National Farmers, see 736 F.2d 1320, 1321 n.3, 1323 and n.4 (9th Cir. 1984),* and has not subsequently held the distinction invalid.

n19 *1996 WL 512363* (9th Cir.).

n20 *76 F.3d 930, 938-39 (8th Cir. 1996).*

n21 *Montana's* holding prohibiting regulation of nonmember hunting and fishing on fee lands owned by nonmembers rested on findings that (1) property rights in the river bed had never been conveyed to the tribe by the United States; and (2) no clear relationship to tribal self-government existed because the riparian land was no longer owned by the tribe. In contrast, in this case, the parties do not dispute that the events at issue here occurred on land allotted to Mr. Hicks, a member of the tribe, and within reservation boundaries.

n22 The record indicates the Fallon Tribal Court and the Intertribal Court of Appeals follow an essentially Anglo-American mode of operation. At the October 16, 1995, summary judgment hearing, counsel for defendants represented to this court that Hicks expects federal substantive law to govern his federal law claims in the tribal court. However, these facts are not dispositive here. Many tribal court systems have exhibit a meld developed from an interaction between federal regulation and Indian tribal customs. In some tribes, federal notions of separation of powers and tripartite government are not strictly observed; "tribal councils may act as

appellate bodies as well as executive decision makers . . . the sources of law, permissible styles of argument, and structure of the proceedings may vary substantially from what practitioners have come to expect in federal courts." Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U.Chi.L.Rev. 671, 737 (1989).* While in an extreme case, a confluence of these factors might provide a basis for overturning a final tribal court decision, neither the procedural posture nor the facts of this case make such a decision appropriate here.

n23 *419 U.S. 544, 557 (1975). See also Cardin v. Cruz, 671 F.2d 363, 366 (9th Cir. 1982)* (to hold otherwise would "reduce to a nullity the Supreme Court's repeated assertions that Indian tribes retain attributes of sovereignty over their territory, not just their members" [internal citations omitted]).

n24 "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Iowa Mutual, 480 U.S. 9, 18, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1986).*

n25 These instances have thus far been limited to "when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or [criminally] prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-154, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980).*

n26 The court stated, "The Court finds that it is not prevented by doctrines of sovereign or qualified immunity from lawfully exerting personal jurisdiction over the specially appearing State defendants." Plaintiffs concede (# 33, P.13) that this issue was not exhausted in the tribal court.

n27 This court expresses no opinion as to whether it would have jurisdiction to review a tribal court determination of that issue. *National Farmers* and *Iowa Mutual* both contemplate some post-exhaustion review; however, the breadth of that review is as yet undefined. While National Farmers's almost casual reference to "review on the merits" suggests that a tribal court's resolution of the underlying claims is subject to federal review, dicta in *Iowa Mutual* proposes that after tribal court resolution of the merits, the parties

ill be collaterally estopped from relitigating, in federal court, the legal issues in the underlying claims. *See* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction, 73 N.C. L.Rev. 1089, 1119 (1995); Iowa Mutual v. LaPlante, 480 U.S. 9, 19, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987); National Farmers Union v. Crow Tribe, 471 U.S. 845, 856, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985).*

Of course, the court is, in this decision, engaging in the *de novo* review of the tribal co rt's jurisdictional ruling clearly required by *National Farmers* and *Iowa Mutual*. However, the court notes hat those two opinions seem to represent contradictory approaches to the question of post-exhaustion federal review of the substantive legal issues going to the merits of the underlying litigation.

n28 *But see Iowa Mutual, 480 U.S. 9, 16 n.8, 94 L. Ed. 2d 10, 107 S. Ct. 971* ("Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.")

n29 The amended complaints, at # 37 and # 38 in the official Record, as modified by stipulation of the parties, are currently the operative complaints in the underlying tribal court actions, CV-FT-91-034 and CV-FT-91-031. Molini is a named defendant in CV-FT-91-034.

APPENDIX C

IN THE WESTERN NEVADA INTER-TRIBAL COURT
OF APPEALS

FLOYD HICKS,

Appellant,

vs.

REBECCA HAROLD, et al.

Respondent. /

No. CV-FT-91-034
No. CV-FT-92-031

Appeal from an order quashing service of process upon State Defendants. Fallon Paiute-Shoshone Tribal Court, Stillwater, Nevada; Joseph Van Walraven, Associate Judge.

Reversed and Remanded

Ronald E. Johnny, for Appellant.

C. Wayne Howle, Deputy Attorney General.

Richard E. Olson, Jr., Tribal Prosecutor,

for Respondent

OPINION

BY JUDGE C. Stephen Rowley: Findings of Fact.

The court makes the following findings of fact: That the plaintiff Floyd Hicks (Hicks) appeals an order quashing service of process upon the State Defendants, preventing the State Defendants in their individual and official capacities from being sued in the Fallon Paiute-Shoshone Tribal Court (Fallon Tribal Court).

That in 1986, the Business Council of the Fallon Paiute-Shoshone Tribes (Tribe) enacted a Law & Order Code which, among many other provisions, required:

1) That Fallon Tribal Court take jurisdiction over all civil causes of action, over persons and things, arising or existing

within the territorial jurisdiction of the court (Title 1, §1-20-020(b)).

2) That the act of entry upon the territory within the jurisdiction of the Fallon Tribal Court shall conclusively be deemed consent to the jurisdiction of the Fallon Tribal Court with respect to any civil action arising out of such entry (Title 1, §1-20-020(b)).

3) That before any state official could conduct a search or make an arrest pursuant to a state court warrant on the Fallon Indian Reservation or Colony that there had to be a reciprocal agreement allowing the Tribe to officially serve its warrants off the reservation and colony (Title 1, §4-40-060(f)) and there had to be a felony investigation (Title 1, §4-04-060(c)).

4) That before a state official could conduct a search and seizure, a Tribal Search Warrant, the form described in detail by tribal law, must be issued by a judge of the court (Title 1, §4-40-010), 4-40-030(a)).

5) That before any evidence of criminal activity that took place off the reservation could be removed from the reservation by state officials there had to be a dispositional hearing (Title 1, §4-40-040).

6) That the Nevada Rules of Civil Procedure and general Civil Laws of the State of Nevada were to be used by the judges of the Fallon Tribal Court, as they thought necessary, but "not so as to impede the administration of justice nor contravene the application of any tribal law or custom or federal law not to produce any absurd result nor impose any regulatory scheme or policy not contemplated by the tribe nor to interfere with the tribe's laws or policies on any subject on any subject regulated by the tribe." (Title 1, §1-30-040)

That in 1990 and 1991, State Defendants repeatedly, and voluntarily, availed themselves of the jurisdiction of the Fallon Paiute-Shoshone Tribal Court, after obtaining legal counsel from the Churchill County District Attorney, to seek permission to conduct a search of Hicks' allotted Indian lands and his residence on the Fallon Indian Reservation for evidence of the killing of the California subspecies of Big Horn Sheep, a gross misdemeanor under Nevada law.

That in 1990 and 1991, State Defendants repeatedly, and

voluntarily, entered the Fallon Indian Reservation, after obtaining what may be on valid search and seizure warrant from the Justice of the Peace, New River Township, Churchill County, Nevada.

In 1990 and 1991, all in contravention of tribal law, the chief judge of the Fallon Tribal Court repeated authorized the defendants to:

1) Enter the Plaintiff's allotted Indian lands and residence, respectively, for the purpose of seizing evidence of freshly killed Big Horn Sheep of the California subspecies;

2) Seize the Plaintiff's aged mounted heads of the Rocky Mountain subspecies of Big Horn Sheep; and

3) Remove the Plaintiff's mounted heads from the exterior boundaries of the Fallon Indian Reservation and Colony without the required dispositional hearing.

There was and is no reciprocal agreement or Tribal-State Compact regarding the honoring of each jurisdiction's warrants and this was not a felony investigation.

During the December 4, 1991, Status Conference Hearing Judge Van Walraven defined what "guide" meant in Title 1, §1-30-040 and adopted and applied NRCP Rule 11 to all parties, including State Defendants' legal counsel demonstrating what he meant by his definition of the ward "guide."

This is the second time the Fallon Tribal Court has issued an order quashing service of process upon State Defendants. The first order, which is not before us, was issued after the Fallon Tribal Court, under the direction of Tribal Defendant/Chief Judge Harold, had effected official service of process upon the State Defendants by use of Certified, U.S. Mail. At that point in time, no judge of the Fallon Tribal Court had issued an order authorizing extraterritorial service of process as permitted by tribal law. (Title 1, §1-30-040)

That on May 3, 1993 Judge Joseph Van Walraven issued an order "adopt[ing] an apply[ing] the Nevada Rules of Civil Procedure (NRCP), Rule 4, inclusive, for the remainder of th[e] case[s]" without modifying the language of NRCP Rule 4(f) and without limiting service to within the exterior boundaries of the Fallon Indian Reservation and Colony only.

NRCP Rule 4(f) states, in part:

Territorial Limits of Effective Service. All process

... may be served anywhere within the territorial limits of the State [of Nevada] and, when a statute or rule so provides, beyond the territorial limits of the State. (Emphasis added.)

That on February 25, 1993, Judge Joseph Van Walraven adopted and applied NRCP Rules "26-37, inclusive, for the remainder of th[e] case[s]."

That on July 22, 1993, Chief Judge Harold, one of the named defendants in these cases, and Judge Van Walraven, enacted Title 2A of the Fallon Law & Order Code, governing "Jury Trials Procedures." Title 2A was imposed on the Plaintiff and State Defendants during their jury trial.

That in August 1993, the idigent [sic] Plaintiff at his own personal expense, and in reliance on Judge Van Walraven's May 3, 1993 order adopting and applying NRCP Rule 4(f), effected private service of process upon the State Defendants by publication in the Reno Gazette-Journal. (See Affidavit of Lisa A. Wakayama (August 25, 1993)).

That on February 1, 1994, Judge Joseph Van Walraven issued a written order quashing Plaintiff's August 1993 service of process upon the State Defendants by private means on the basis that he found "no method for extraterritorial service of the summons and complaint beyond the boundaries of the Fallon Paiute-Shoshone Tribes and [that] the court further [found] that there is no 'long-arm' statute or ordinance in effect on the Fallon Paiute-Shoshone Tribes." (Order Quashing Service Of Process As To Specially Appearing State Defendants at 1, lines 21-25).

Conclusions of Law

Plaintiff asserts that the Fallon Tribal Court neither correctly applied the relevant law nor was the court's decision of fact supported by substantial evidence. (These are the sole grounds for appeal by tribal law. See Title 1, Fallon Paiute-Shoshone Law & Order Code Title 1, §1-90-030(a), (b)). We conclude not only the Hicks effected a valid form of private service of process upon the State Defendants, but because of three reasons the State Defendants are properly before the Fallon Tribal Court for suit. First, the State Defendants acts of repeated voluntary entry onto the Fallon Indian Reservation and the Plaintiff's allotted Indian lands; Second, State Defendants repeatedly availing themselves,

voluntarily, of the jurisdiction of the Fallon Tribal Court that State Defendants; and, Third, the declaration of tribal law that the act of entry upon the Fallon Indian Reservation and Colony "shall conclusively be deemed consent to the jurisdiction" of the Fallon Tribal Court. We therefore remand to the Fallon Tribal Court to immediately set a trial date and allow the Plaintiff's civil jury trials to be heard without further delay consistent with this opinion.

We start our discussion with the advisement of Felix S. Cohen:

> Indian law is an extraordinary rich and diverse field. The cases, both old and new, weave a fabric with threads drawn from constitutional law, international law, federal jurisdiction, conflict of laws, real property, contracts, corporation, torts, domestic relations, procedure, trust law, intergovernmental relations, sovereign immunity, and taxation. Typically, as those fields meld into Indian law, the blend produces a new variation the could not have been predicted by analysis of the applicable law from those other fields. (Handbook of Federal Indian Law (Michie Pub. Co., 1982), the most recognized treatise on Indian law.)

It is not enough that a judge of a tribal court merely looks to state law for the answers to the issue presented. Indian law analysis which includes a review of custom, tradition and tribal common law, requires more. It does not affect the jurisdiction of this court that State Defendants' counsel admits that he lacks any knowledge of the customs, tradition and common law of the Fallon Tribes or the Northern Paiute and Western Shoshone Nations.

The holdings and interpretations of procedure by Nevada and other state courts identified by State Defendants, while supporting this court's decision, are not controlling on the Fallon Tribal Court or this court because when NRCP Rule 4(f) is melded into Title 1, §1-30-040, the blend produces a different result. (See State Defendants' Points and Authorities In Support Of Renewed Motion To Quash Service Of Process at 4, lines 4-19, citing Crummer v. Fourth Jud. Dist., 69 Nev. 276, 283, 249 P.2d 226 91952); Lain v. John Hancock Mut. Life Ins., 398 N.E.2d 278

(Ill.App.1979); Hunguenor v. Hunguenor, 420 So.2d 344 (Fla.App.1982); Braley v. Horton, 432 So.2d 463 (Ala.1983)).

Contrary to the opinion of the tribal court and the State Defendants, there is no need for the separate "long-arm" statute for extraterritorial service of process and one [sic] Judge Van Walraven issued a rule providing for extra territorial service of process by the methods approved by NRCP Rule 4(f), service in accordance with such rule of the court is valid.

Judge Van Walraven's authority to approve and apply Indian law is demonstrated by his adopted of NRCP Rules 4, inclusive, 11, inclusive 26-37, inclusive, NRS 49.335 et seq., and Title 2A of the Law & Order code, and he is stopped from denying such authority after the indigent Plaintiff has observed repeated demonstration of such authority and relied upon Judge Van Walraven's actions. (Judge Van Walraven's act of ordering the adoption and application of these provisions of NRS clearly demonstrate his broad authority from the Business Council).

The fact that the Fallon Business Council has not acted to reverse Judge Van Walraven's orders adopting and apply NRCP Rules 4, 11, 26-37, NRS 49.335 et seq., and Title 2A of their Law & Order Code demonstrates that he acts with the approval of the tribe's Legislature and governing body, thus Judge Van Walraven has not usurped the choices of the Fallon Business Council as suggested by State Defendants.

As well, Judge Van Walraven's order amending his May 3, 1993, adoption and application of NRCP Rule 4, inclusive, fails under tribal law (Title 1, §1-30-040) because it:

1) Emasculates the Fallon Tribal Court and renders it useless to reservation residents; impedes the administration of justice,

2) Contravenes the application of tribal law;

3) Contravenes the application of tribal custom,

4) Contravenes the application of federal laws, produces an absurd result, and

5) Interfere's [sic] with the tribe's laws declaring jurisdiction in these very types of civil matters.

Given the declaration of tribal law, that the "act of entry upon the territory within the jurisdiction of the court shall

conclusively be deemed consent to the jurisdiction of the [Fallon Tribal Court] with respect to any civil action arising out of such entry," the Plaintiff did not need tribal law authorization to effect notice of suit outside the exterior boundaries of the Fallon Indian Reservation. Plaintiff could have merely mailed notice of suit to the State Defendants since their act of entry is conclusively deemed as consent to suit.

With regard to State Defendants' argument that as mere Nevada game wardens they lacked authority to subject the State of Nevada to suit in tribal court or that they lacked authority to consent to suit by the act of their entry on the Fallon Indian Reservation, State Defendants ignore the fact that sought legal counsel from the Churchill County District Attorney before repeatedly entering the Fallon Indian Reservation and the Plaintiff's allotted Indian lands voluntarily.

If a judgment is entered against the State Defendants following trial, they have the right to contribution by a number of persons, including the Churchill County District Attorney. Moreover, the August 1990 Search and Seizure Warrant issued by Justice of the Peace Marilyn Craig clearly on its fact advised State Defendants that they were entering a jurisdiction in which Nevada law did not apply.

State Defendants would do well to recognize that they have not only been sued in their official capacity, but their individual capacity as well.

Moreover, State Defendants' argument appears only to be an extension of their unsuccessful argument in Hall v. Nevada (8 Cal.3d 522, 105 Cal.Rptr. 355, 503 P.2d 1363, 1365-1366 (1972)), and Nevada v. Hall (440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416, reh. denied, 441 U.S. 917 (1979)). For the same reasons that California's courts exist to protect their citizens so do tribal courts. (See Hall v. Nevada, 8 Cal.3d 522, 105 Cal.Rptr. 355, 503 P.2d 1365 (1972) (citing People v. Streeper, 12 Ill.2d 204, 145 N.E.2d 625, 629 91957) for the proposition that the sovereignty of one jurisdiction does not extend into the territory of another so as to create immunity from suite)).

With regard to State Defendants' objection to the method of private service given the practicalities and peculiarities of these cases. The State Defendants were given notice and it was effective

because they appeared to contest the service. That is all that is required of by federal law. See Mulane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), where the Court held:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must afford a reasonable time for those interested to make their appearance . . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. . . ."

339 U.S., at 314-315.

Order

This matter is therefore Ordered by this Court to be reversed & remand for full consideration with regards to all of the above findings of fact & conclusions of law.

Reversed and Remanded.

FILED: May 13, 1994.

BY: Clarence B. McDade, Chief Appellate Judge
_____, Appellate Judge
(unreadable)

I concur in the result of the majority opinion.

BY: Charles R. Hostnik, Appellate Judge

APPENDIX D

NOT FOR PUBLICATION
UNITES STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF NEVADA; WILLIAM MOLINI, NEVADA DIVISION OF WILDLIFE; and MICHAEL C. SPENCER, RICH ELLINGTON and BILL FITZMORRIS,
Plaintiffs-Appellants,

vs.

FLOYD HICKS; TRIBAL COURT in and for THE PAIUTE-SHOSHONE TRIBES; HONORABLE JOSEPH VAN WALRAVEN,
Defendants-Appellees, /

NO. 96-17315

D.C. No. CV-94-00351-DWH

ORDER

Before: GOODWIN, B. FLETCHER and RYMER, Circuit Judges

Judges Goodwin and B. Fletcher voted to deny the petition for rehearing and recommended rejection of the petition for rehearing en banc. Judge Rymer voted to grant the petition for rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

FILED: MARCH 9, 2000.

APPENDIX E

CASE NO. 90-02065

IN THE JUSTICE'S COURT OF THE NEW RIVER TOWNSHIP
COUNTY OF CHURCHILL, STATE OF NEVADA

IN THE MATTER OF THE
APPLICATION FOR A SEARCH WARRANT. AFFIDAVIT

_____/

STATE OF NEVADA)
: ss.
COUNTY OF CHURCHILL)

MIKE SPENCER, being first duly sworn according to law, deposes and says:

1) That I am a Game Warden for the Nevada Department of Wildlife and have been so employed for approximately five (5) years.

2) That in that capacity, I have been, for about a year and a half, investigating the possible crime of Possessing or Killing a Big Horn Sheep, a Gross Misdemeanor, in violation of N.R.S. 501.376, involving FLOYD HICKS.

3) That with the aid of a Confidential Informant, who has provided reliable information in the past resulting in convictions, certain information, and have made personal observations which corroborates said information.

4) That on or about January of 1989, Confidential Informant advised me that in June of 1988 he observed two (2) dead big horn sheep in the back of a pickup truck owned by FLOYD HICKS.

5) That Confidential Informant further advised me that the two (2) dead sheep appeared to have been dead for less than twenty four (24) hours.

6) That Confidential Informant further advised me that suspect, FLOYD HICKS, admitted to possessing said sheep and was planning on taking same to a taxidermist in Fallon, Nevada.

7) That later, on or about August 30, 1990, at about 1:00 o'clock p.m., I was advised by special agent James W. Rogers of the U.S. Department of Interior – Bureau of Land Management that on August 29, 1990, he observed one big horn sheep head protruding from an open trunk of a vehicle located on FLOYD HICKS' premises, at 7755 Stillwater Road, Fallon, Nevada.

8) That Mr. Rogers advised me that on said date of said observation he and his investigative aid, George High of the Bureau of Land Management, were on FLOYD HICKS' property at 7755 Stillwater Road, Fallon, Nevada, for the purpose of conducting an unrelated investigation.

9) That based on the information above, I personally observed, from Stillwater Road, a big horn sheep head with horns protruding from the trunk of a vehicle located on FLOYD HICKS' property at 7755 Stillwater Road, Fallon, Nevada.

10) That your affiant is informed and believes that since 1982, no person with the surname of HICKS, of Fallon, Churchill County, Nevada has obtained a proper big horn sheep tag from the Nevada Department of Wildlife.

WHEREFORE, affiant prays that a Search Warrant be issued directing the search of the premises and property located at 7755 Stillwater Road, Fallon, Churchill County, Nevada, for the purpose of seizing any big horn sheep heads and/or evidence of possession, ownership or control of same and that said search to be made between the hours of 7:00 o'clock a.m. and 7:00 o'clock p.m.

DATED: August 30, 1990.

BY: Michael Spencer, Game Warden
Nevada Department of Wildlife

SUBCRIBED and SWORN to before me
this 30th day of August, 1990.
Lena McQueen, Notary Public
My appointment expires Dec. 6, 1993.

APPENDIX F

IN THE FALLON PAIUTE-SHOSHONE TRIBAL COURT

IN THE MATTER OF THE APPLICATION FOR A SEARCH AND SEIZURE WARRANT. /	ORDER APPROVING AND AUTHORIZING EXECUTION OF SEARCH WARRNT ON TRIBAL RESERVATION

The within affidavit and search warrant having been reviewed by the Court, and probable cause appearing, and good cause therefore;

IT IS HEREBY ORDERED that the search warrant is approved (as modified below) and execution of said warrant is authorized for the premises of FLOYD HICKS, 7755 Stillwater Road, Churchill County, Nevada, located within the exterior boundary of the Fallon Paiute-Shoshone Indian Reservation.

Modified as follows: N/A.

DATED: June 13, 1991

BY: Rebecca Ann Harold
Tribal Court Judge

ATTACHMENT TO ABOVE ORDER (APP. F):

IN THE JUSTICE'S COURT OF THE NEW RIVER TOWNSHIP
COUNTY OF CHURCHILL, STATE OF NEVADA

CASE NO. 91-01248

IN THE MATTER OF THE	
APPLICATION FOR A SEARCH	SEARCH AND
AND SEIZURE WARRANT. /	SEIZURE WARRANT

THE STATE OF NEVADA TO:

ANY PEACE OFFICER IN THE COUNTY
OF CHURCHILL, STATE OF NEVADA

Proof by Affidavit having been made this date before me by Game Warden MICHAEL C. SPENCER of the Nevada Department of Wildlife, that there is probable cause to believe that the crime of: POSSESSING OR KILLING A BIG HORN SHEEP, in violation of N.R.S. 501.376, a Gross Misdemeanor has been committed, and that evidence of said crime, to wit: two (2) mounted big horn sheep heads, is believed to be located at the residence at 7755 Stillwater Road, Fallon, Churchill County, Nevada;

YOU ARE HEREBY COMMANDED, to search for and seize said mounted big horn sheep heads, at the property and premises of FLOYD HICKS, 7755 Stillwater Road, Churchill County, Nevada. Said service of said warrant to be made between the hours of 7:00 o'clock a.m. and 7:00 o'clock p.m., with return of said warrant to be made to the above-entitled court.

DATED: June 12, 1991.

BY: Daniel P. Ward, Justice of the Peace
New River Township

ATTACHMENT TO ABOVE ORDER (APP. F):

CASE NO. 91-01248

IN THE JUSTICE'S COURT OF THE NEW RIVER TOWNSHIP
COUNTY OF CHURCHILL, STATE OF NEVADA

IN THE MATTER OF THE
APPLICATION FOR A SEARCH AND SEIZURE WARRANT. /

AFFIDAVIT

STATE OF NEVADA)
: ss.
COUNTY OF CHURCHILL)

I, MIKE SPENCER, being first duly sworn, according to law, deposes and says:

1) That I am a Game Warden for the Nevada Department of Wildlife and have been so employed for approximately five and one half years.

2) That in that capacity, I have been, for about two and one half years, investigating the possible crime of Possessing or Killing a Big Horn Sheep, a Gross Misdemeanor, in violation of N.R.S. 501.376, involving FLOYD HICKS.

3) I have received information from a Confidential Informant, who has provided reliable information in the past, resulting in convictions.

4) That on or about January of 1989, Confidential Informant advised me that in June of 1988 he observed two (2) dead big horn sheep in the back of a pickup truck owned by FLOYD HICKS, within Churchill County, Nevada.

5) That Confidential Informant further advised me that the two (2) dead sheep appeared to have been recently killed, with fresh, liquid blood still evident.

6) That Confidential Informant further advised me that suspect, FLOYD HICKS, admitted to possession of said sheep

and was planning on taking same to a taxidermist in Fallon, Nevada.

7) That later, on or about June 1, 1991, at about 11:00 o'clock a.m., I was advised by Officer Robert Wise of the Fallon Paiute-Shoshone Tribal Police Department, that on June 8, 1991, he observed two mounted big horn sheep ram heads in a bedroom in the house located on FLOYD HICKS' premises, at 7755 Stillwater Road, Churchill County, Nevada.

8) That Mr. Wise advised me that on said date of said observation, he was on FLOYD HICKS' property at 7755 Stillwater Road, Churchill County, Nevada, for the purpose of conducting an unrelated investigation.

9) The observations of Wise independently corroborate the information supplied by the Confidential Informant.

10) That your affiant is informed and believes that since 1982, no person with the surname of HICKS, of Fallon, Churchill County, Nevada has obtained a proper big horn sheep tag from the Nevada Department of Wildlife.

WHEREFORE, affiant prays that a Search Warrant be issued directing the search of the premises and property located at 7755 Stillwater Road, Fallon, Churchill County, Nevada, for the purpose of seizing any big horn sheep heads and that said search to be made between the hours of 7:00 o'clock a.m. and 7:00 o'clock p.m.

DATED: June 12, 1991.

BY: Michael C. Spencer, Game Warden
Nevada Department of Wildlife

SUBCRIBED and SWORN to before me
this 12th day of June, 1991.
Daniel P. Ward, Justice of the Peace
New River Township, Churchill County, Nevada

APPENDIX G

IN THE JUSTICE'S COURT OF THE NEW RIVER TOWNSHIP
COUNTY OF CHURCHILL, STATE OF NEVADA

SEARCH WARRANT

THE STATE OF NEVADA TO:

ANY PEACE OFFICER IN THE COUNTY
OF CHURCHILL, STATE OF NEVADA

Proof by Affidavit having been made before me this day by GAME WARDEN MIKE SPENCER, of the Nevada Department of Wildlife that there is probable cause to believe that big horn sheep heads or evidence of same, is located at 7755 Stillwater Road, Fallon, Churchill County, Nevada:

YOU ARE HEREBY COMMANDED, SUBJECT TO OBTAINING APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES, to search the said premises located at 7755 Stillwater Road, Fallon, Churchill County, Nevada, for any big horn sheep heads or evidence of same, said search to be made between the hours of 7:00 o'clock a.m. and 7:00 o'clock p.m.

This Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute-Shoshone Tribes of Fallon, Churchill County, Nevada.

Dated: August 30, 1990.

M.D. Craig, Judge, New River Township

APPROVED and amended – applies to exterior premises only and to vehicles thereon; may be exercised 7:00 a.m. through 8:00 p.m.

Rebecca Ann Harold, Tribal Court Judge

APPENDIX H

IN THE TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES
CHURCHILL COUNTY, NEVADA

FLOYD HICKS
Plaintiff,

vs.

Tribal Judge REBECCA HAROLD; STATE OF NEVADA; Director, Nevada Department of Wildlife, WILLIAM MOLINI; Nevada State Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON, and BILL FITZMORRIS and their CONFIDENTIAL INFORMANT; Tribal Police Officers BOB WISE and BOB MINTON; and JOHN DOES I Thru X, and REBECCA HAROLD, WILLIAM MOLINI, MICHAEL C. SPENCER, RICK ELLINGTON, BILL FITZMORRIS, CONFIDENTIAL INFORMANT, BOB WISE, BOB MINTON, and JOHN DOES I thru X, individually.

Defendants. /

CASE NO. CV-FT-91-034

COMPLAINT

NOW COMES the Plaintiff, FLOYD HICKS, through his legal counsel of record, RONALD E. JOHNNY, who states and affirms as follows:

1. That the Plaintiff is an Indian and enrolled member of the Fallon Paiute-Shoshone Tribes and a dual resident of the Fallon Indian Reservation and Churchill Count, State of Nevada.[1]

2. That the residence of the Plaintiff is 7755 Stillwater Road, Fallon, Churchill County, Nevada, but within the exterior boundaries of the Fallon Paiute-Shoshone Indian Reservation and outside the civil and criminal jurisdiction of state officials with

regard to the Plaintiff[2] and his property except as provided by federal law and perhaps tribal law.[3]

3. That all Defendants, except perhaps the CONFIDENTIAL INFORMANT of Nevada Game Warden SPENCER, are non-Indians but subject to the civil jurisdiction of this court in accordance with federal law, a decision of the United States Supreme Court[4] and tribal law.[5]

4. That tribal court judges and tribal police officers are not immune from civil damages under trial law if "malicious intent" or "bad faith" can be shown to be present in their deliveratios and/or actions.[6]

I.

Denial of Equal Protection Under the ICRA

5. That the Indian Civil Rights Act[7] (hereinafter "ICRA"), enacted by Congress in 1968, states, in pertinent part:

> "No Indian tribe in exercising powers of self-government shall—
>
> * * *
>
> "(8) deny to any person within its jurisdiction the equal protection of its laws...."

See also Cohen, supra, at 667.

6. That on June 13, 1991, Tribal Court Judge REBECCA HAROLD[8] issued a document entitled "ORDER APPROVING AND AUTHORIZING EXECUTION OF SEARCH WARRANT ON TRIBAL RESERVATION." See Plaintiff's Exhibit No. 1.

7. That the document, identified-above, issued by Tribal Court Judge HAROLD was done without any legal basis and in clear and utter disregard for tribal law.[9]

8. Given the legal education and legal experience of Tribal Court Judge REBECCA HAROLD such disregard of tribal law is evidence of malicious intent or bad faith.

9. That on June 13, 1991, Fallon Tribal Police Officer BOB MINTON and persons identifying themselves as Game Wardens, Nevada Department of Wildlife, MICHAEL C. SPENCER, BILL FITZMORRIS and RICK ELLINGTON, entered the allotted individual Indian land[10] of the Plaintiff on the Fallon Paiute-Shoshone Indian Reservation without the Plaintiff's permission and

ordered the Plaintiff to submit to the search of his home.

10. Game Warden MICHAEL C. SPENCER showed the Plaintiff, but did not give him, a copy of a Search and Seizure Warrant issued by DANIEL P. WARD, Justice of the Peace, New River Township, Churchill County, State of Nevada, dated June 12, 1991. See Plaintiff's Exhibit No. 2.

11. That the Plaintiff is a long-time former tribal police officer with the Fallon Paiute-Shoshone Tribes with many years of honorable service.

12. Based upon the Plaintiff's tribal police experience and knowledge of tribal law, the Plaintiff demanded knowledge from Game Warden SPECNER[11] as to whether or not the Game Wardens of the Nevada Department of Wildlife, to-wit: SPENCER, FITZMORRIS and ELLINGTON, had a search warrant issued from a judge of the Tribal Court of the Fallon Paiute-Shoshone Tribes, in accordance with tribal law, and legal authority to be on his property.

13. That Game Warden SPENCER told the Plaintiff that they (meaning all Nevada state Game Wardens) had a valid search warrant from a tribal judge but he refused to show it to the Plaintiff or give him a copy.[12]

14. That given the fact that Tribal Police Officer BOB MINTON was prepared to arrest the Plaintiff if he refused to allow Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON to enter his home and conduct the search of his home, the Plaintiff unwillingly allowed Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON to invade his home.

15. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON entered the Plaintiff's residence on the Fallon Indian Reservation.

16. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON entered the Plaintiff's residence on the Fallon Indian Reservation under color of an state court Search and Seizure Warrant they knew to be invalid.[13]

17. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON entered the Plaintiff's residence on the Fallon Indian Reservation under color of an tribal document issued by

Tribal Court Judge REBECCA HAROLD they knew was not authorized by tribal law.[14]

18. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON searched the Plaintiff's residence on the Fallon Indian Reservation.

19. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON secured and took from the Plaintiff's residence a Big Horn sheep head, that is approximately 40-45 years old, that they sought in accordance with the Search and Seizure Warrant of Justice of the Peace WARD and the tribal document issued by Tribal Court Judge REBECCA HAROLD.

20. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON took personal property of the Plaintiff from his home, to-wit: an aged head of a Big Horn sheep unlawfully and in violation of the Indian Civil Rights Act equal protection clause.

II.

Unreasonable Search and Seizure under the ICRA

21. The Plaintiff incorporates paragraphs numbers 1 thru 20 in this cause of action.

22. That the Indian Civil Rights act, supra, states, in pertinent part:

> "No Indian tribe in exercising powers of self-government shall—
>
> * * *
>
> "(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." (Emphasis added.)

See also Cohen, supra, at 666.

23. That no person went before Tribal Court Judge REBECCA HAROLD with an application for a tribal search warrant.

24. That no person went before Tribal Court Judge REBECCA HAROLD with an application for a tribal search warrant support by oath or affirmation.[15]

25. That no person went before Tribal Court Judge REBECCA HAROLD with an application for a tribal search warrant particularly identifying what part of the Plaintiff's premises were to be search.[16]

26. That Tribal Court Judge REBECCA HAROLD failed to issue a tribal search warrant authorizing Tribal Police Officer BOB MINTON and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON and BILL FITZMORRIS to enter the private property of the Plaintiff.

27. That Tribal Court Judge REBECCA HAROLD failed to issue a tribal search warrant authorizing Tribal Police Officer BOB MINTON and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON and BILL FITZMORRIS to enter and search a particular part of the Plaintiff's premises.

28. Tribal Court Judge REBECCA HAROLD violated the search and seizure clause of the Indian Civil Rights Act and such act constitutes malicious intent or bad faith given her legal education and experience.

III.

Unreasonable Search and Seizure under Tribal Law

29. The Plaintiff hereby incorporates paragraphs number 1 thru 28 for this cause of action.

30. That tribal law[17] specifically sets for the mandatory requirements prior to a tribal judge being able to issue a tribal search warrant in cases where non-tribal authorities seek a search warrant. See Title 4, Fallon Tribal Code, §4-40-060 et seq.

31. Before a judge of the Fallon Indian court may issue a search warrant for an off reservation non-Indian jurisdiction crime a felony crime or felony investigation must be involved. See Title 4, Fallon Tribes Law and Order Code §4-40-060(d).

32. There was no probable cause to believe that the Plaintiff had committed a felony off the reservation in the State of Nevada. See Affidavit of MICHAEL C. SPENCER to Justice of the Peace WARD, page 1, lines 19-22 ("Gross Misdemeanor"); Plaintiff's Exhibit No. 3. See also Search and Seizure Warrant of Justice of the Peace WARD, page 1, line 14-21 ("Gross Misdemeanor").

33. Tribal law requires that before a tribal search warrant may be issued in felony cases that the State of Nevada must have a

signed agreement with tribal authorities allowing tribal warrants to be served in an identical manner. See Title 4, Fallon Tribes Law and Order Code, §4-40-060(f).

34. There is no signed agreement between the State of Nevada and the Fallon Tribes to reciprocate as to search warrants.

35. That Tribal Court Judge REBECCA HAROLD's issuance of the document entitled "ORDER APPROVING AND AUTHORIZING EXECUTION OF SEARCH WARRANT ON TRIBAL RESERVATION is not only not authorized by tribal law but is also either evidence of malicious intent or bad faith, given her legal education and experience.

IV.

Denial of Due Process under ICRA

36. The Plaintiff hereby incorporates paragraphs numbered 1 through 35 in this cause of action.

37. That the ICRA, supra, states, in pertinent part:

> "No Indian tribe in exercising powers of self-government shall--
>
> * * *
>
> "(8) deny to any person within its jurisdiction . . . liberty or property without due process of law;"

See also Cohen, supra, at 667.

38. The use of an invalid process to bootstrap the tainted Search and Seizure Warrant of Justice of the Peace WARD into a valid tribal order denied the Plaintiff due process under the ICRA.

39. Given the length of time the Plaintiff has been in possession of the item sought by Nevada Game Warden SPENCER,[18] it was a denial of due process for Tribal Court Judge REBECCA HAROLD not to initiate a lawful process whereby the Big Horn sheep head was seized, if possible under tribal law, and a hearing held to determine whether Nevada Game Warden SPENCER had a legal right to secure same under tribal law since no felony was being investigated.

V.

Trespass to Land

40. The Plaintiff incorporated paragraphs numbered 1 thru 30 in this cause of action.

41. Tribal Court Judge REBECCA HAROLD, in concert with Tribal Police Officer BOB MINTON and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON and BILL FITZMORRIS, by issuing an invalid tribal document, [19] participated in and did unlawfully enter the Plaintiff's allotted Indian lands (property)[20] – a trespass.

42. Tribal Court Judge REBECCA HAROLD, in concert with Tribal Police Officer BOB MINTON and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON and BILL FITZMORRIS, by issuing an invalid tribal document, participated in and did unlawfully enter the Plaintiff's residence – a trespass. See Citations at Footnote 19 and 20.

43. That such Trespass to Land is evidence of malicious intent or bad faith on the part of Judge HAROLD, Tribal Police Officer MINTON and Nevada Game Wardens SPENCER, ELLINGTON and FITZMORRIS.

VI.

Trespass to Chattels

44. The Plaintiff hereby incorporates paragraphs number 1 thru 43 in this cause of action.

45. That without legal authority, Tribal Court Judge REBECCA HAROLD ordered, and Tribal Police Officer BOB MINTON and Nevada Game Wardens SPENCER, ELLINGTON, and FITZMORRIS unlawfully took the property of the Plaintiff, to-wit: one Big Horn sheep head, from the sanctity of the Plaintiff's residence.

46. That such action of the Defendants HAROLD, MINTON, SPENCER, ELLINGTON and FITZMORRIS constitutes a trespass to chattels.[21]

47. That such action of the Defendants HAROLD, MINTON, SPENCER, ELLINGTON and FITZMORRIS is evidence of a malicious intent or bad faith.

VII.

Wrongful Civil Proceedings

48. The Plaintiff hereby incorporates paragraphs numbered 1 thru 47 in this cause of action.

49. That the Defendants HAROLD, MINTON, FITZMORRIS, ELLINGTON and SPENCER either initiated or participated in a

quasi-civil process which caused an interference with the Plaintiff's property and caused him to expend time, energy and money in preventing the lawful search of his premises under an invalid warrant.

50. A scientific review of the Big Horn sheep head by the Nevada Department of Wildlife has determined that the head is much older than that reported by the Nevada Game Warden SPENCER's Confidential Informant.

51. That the action complained of in paragraph number 49 constitutes the tort of wrongful civil proceedings.[22]

52. That the action of the above-named defendants, in paragraph number 49, is evidence of malicious intent and/or bad faith.

VIII.

Abuse of Process

53. The Plaintiff hereby incorporates paragraphs numbered 1 thru 52 in this cause of action.

54. That Defendants HAROLD, MINTON, WISE, SPENCER, FITZMORRIS and ELLINGTON used an improper process to secure possession of the Plaintiff's property which Defendants SPENCER, FITZMORRIS and ELLINGTON could not otherwise secure because the process used violated the strict requirements of tribal law.

55. The action of the Defendants HAROLD, MINTON, WISE, SPENCER, FITZMORRIS and ELLINGTON constitute the tort of Abuse of Process.[23]

IX.

Infliction of Mental Distress

56. The Plaintiff hereby incorporates paragraphs numbered 1 thru in this cause of action.

57. The acts of the Defendant HAROLD in knowingly issuing an invalid order of the court strictly violates tribal law and exceeds all bounds usually tolerated by decent society and is especially of a nature calculated to cause mental distress.[24]

58. The actions of the Defendants MINTON, WISE, SPENCER, ELLINGTON and FITZMORRIS was emotionally

explosive to a law abiding person such as the Plaintiff and extremely outrageous to the reasonable person.

59. That the action of Tribal Court Judge REBECCA HAROLD, Tribal Police Officers BOB WISE and BOB MINTON, and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON, and BILL FITZMORRIS, and their CONFIDENTIAL INFORMANT, have cause the Plaintiff to be the subject of much insult, indignity, joking, shame and ridicule in his community.

60. That the action of Tribal Court Judge REBECCA HAROLD, Tribal Police Officers BOB WISE and BOB MINTON, and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON, and BILL FITZMORRIS, and their CONFIDENTIAL INFORMANT, have cause the Plaintiff to suffer sleepless nights, loose weight, have bad dreams, suffer health problems, consider suicide, and have cause him to seek professional medical help.

61. That the actions of Tribal Court Judge REBECCA HAROLD, Tribal Police Officers BOB WISE and BOB MINTON, and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON, and BILL FITZMORRIS, and their CONFIDENTIAL INFORMANT, have cause the Plaintiff to suffer from emotional distress.

62. That the extremely outrageous conduct of Defendant HAROLD is evidence of malicious intent or bad faith.

63. That the effect of the extremely outrageous conduct by Defendants WISE, MINTON, ELLINGTON, FTIZMORRIS and ELLINGTON is evidence of malicious intent or bad faith.

WHEREFORE THE PLAINTIFF prays the court:

1. For the first cause of action, denial of equal protection under the Indian Civil Rights Act, award the Plaintiff against the named Defendants the sum of $25,000.

2. For the second cause of action, unreasonable search and seizure under the Indian Civil Rights Act, award the Plaintiff against the named Defendants the sum of $25,000.

3. For the third cause of action, unreasonable search and seizure under tribal law, award the Plaintiff against the named Defendants the sum of $500,000.

4. For the fourth cause of action, denial of due process under the Indian Civil Rights Act, award the Plaintiff against the named Defendants the sum of $25,000.

5. For the fifth cause of action, trespass to land, award the Plaintiff against the named Defendants the sum of $25,000.

6. For the sixth cause of action, trespass to chattels, award the Plaintiff against the named Defendants the sum of $25,000.

7. For the seventh cause of action, wrongful civil proceedings, award the Plaintiff against the named Defendants the sum of $100,000.

8. For the eighth cause of action, abuse of process, award the Plaintiff against the named Defendants the sum of $250,000.

9. For the ninth cause of action, infliction of emotional distress, award the Plaintiff against the named Defendants the sum of $250,000 and an additional $1,000,000.00 in punitive damages.

10. Issue an mandatory injunction directing Tribal Court Judge REBECCA HAROLD to cease from departing from tribal law in the issuance of orders concerning search of Indian residences and seizure of Indian property by state officials.

11. Issue a declaratory judgment that the document issued by Tribal Court Judge REBECCA HAROLD, to-wit: "ORDER APPROVING AND AUTHORIZING EXECUTION OF SERCH WARRANT ON TRIBAL RESERVATION" is without any force or effect and against the dignity of the laws of the Fallon Paiute-Shoshone Tribes.

Respectfully submitted,
RONALD E. JOHNNY, J.D.
Legal Counsel for Plaintiff

CERTIFICATION

I, FLOYD HICKS, hereby state and affirms that I am the Plaintiff in the above-captioned action; that I have read the above Complaint; that I fully understand all statements made in the Complaint and that such statements are true to the best of my knowledge, information and belief.

FLOYD HICKS

Fallon Indian Reservation

SWORN and SUBSCRIBED to before me
this 8th day of July, 1991.
CARRIE SANTOS, Court Clerk
Tribal Court
Fallon Paiute-Shoshone Tribes

FOOTNOTES TO ABOVE COMPLAINT (APP. H)

1. See Felix S. Cohen, Handbook of Federal Indian Law (1982 ed., Michie co. Pub.) (hereinafter "Cohen") at 645-646.

2. See Cohen, supra, at 449. Since only the taking of land was compensated to Northern Paiutes by the United States and not hunting rights, for lands in the State of Nevada taken without a Treaty, the Plaintiff also believes that he may have hunting rights off the Fallon Tribes Indian Reservation within the State of Nevada based on his Northern Paiute ancestry. See Omer C. Stewart, The Northern Paiute Bands, Anthropological Records, Vol. 2, No. 3 (University of California Press, Berkeley, CA 1939) at 141. The Plaintiff, also of Shoshone ancestry, also believes that he has certain undefined hunting rights as a Shoshone Indian within the State of Nevada. See Tulee v. Washington, 315 U.S. 681 (1942); Puyallup I, 391 U.S. 392 (1968); Puyallup II, 414 U.S. 44 (1973). See also Cohen at 458-462.

3. Title 4, Fallon Tribes Law and Order Code §4-40-060 only allows judges of the Fallon Indian court to issue tribal search warrants when there is "probable cause to believe that a felony has occurred [off the reservation], over which the government requesting the search has jurisdiction...." There is no tribal law or other tribal authority that allowed Tribal Court Judge REBECCA HAROLD to issue the document she did, entitled "ORDER APPROVING AND AUTHORIZING EXECUTION OF SEARCH WARRANT ON TRIBAL RESERVATION," dated June 13, 1991, for an allegation of a Gross Misdemeanor within the State of Nevada as set forth in the Affidavit of Nevada Game Warden MICHAEL C. SPENCER, page 1, line 21, and the Search and Seizure Warrant of Justice of the Peace DANIEL P. WARD, page 1, line 18.

4. National Farmers Insurance Co. v. Crow Tribe of Indians, ___ U.S. ___, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985).

5. Title 1, Fallon Tribes Law and Order Code, §1-20-020 (Civil Jurisdiction) states, in pertinent part:

> "(a) The Tribal Court shall have jurisdiction over all civil causes of action, over persons, arising or existing within the territorial jurisdiction of the court.

"(b) Personal jurisdiction shall exist over all persons who are Indians or who consent to the jurisdiction of the Tribal Court. The act of entry upon territory within the jurisdiction of the court shall conclusively be deemed consent to the jurisdiction of the court with respect to any civil action arising out of such entry."

* * *

(Emphasis added.)

6. See Title 1, Fallon Tribes Law and Order Code, §1-1-040 (Immunity of officials and employees) ("Any elected or appointed official or employee of the Fallon ... Tribe shall enjoy ... immunity from suit ... unless it is established that such action was taken with malicious intent or bad faith."). See also Title 4, Fallon Tribes Law and Order Code, §4-40-050(d) (Supplementary Remedies for Illegal Searches and Seizures).

7. Codified at, Title 25, United States Code, §1302.

8. A Nevada state licensed attorney who is also currently or immediately a past chief judge of the Court of Indian Offenses for the Lovelock Paiute Tribe and the chief judge of the Tribal Court for the Fort McDermitt Paiute-Shoshone Tribe, both of Nevada.

9. Title 4, Fallon Tribes Law and Order Code, §4-40-060(a), (c) only allows a tribal court judge to issue a "search warrant" if there is "probable cause to believe that a felony has occurred...." Nevada Game Warden SPENCER was only investigating a Gross Misdemeanor. See Affidavit of Justice of the Peace WARD, page 1, line 21. In addition, the technical requirements of a tribal search warrant, defined at §4-40-010 et seq. were not complied with by Tribal Court Judge HAROLD. There is no tribal law authority for the issuance of the document issued by Tribal Court Judge HAROLD.

10. Seen Cohen, supra, at 39-41.

11. Tribal Police Officer BOB MINTON was not the official who served the Nevada state search and seizure warrant from Justice of the Peace WARD or tribal document upon the Plaintiff as required by tribal law. Tribal police officer MINTON kept a reserve (behind the front lines) position during this entire ordeal.

12. that such refusal to show the tribal search warrant and give

a copy of it to the Plaintiff constitutes malicious intent or bad faith by Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON and Tribal Police Officer BOB MINTON.

13. It is the opinion and belief of the Plaintiff that Nevada Game Warden MICHAEL C. SPENCER intentionally misled Justice of the Peace DANIEL P. WARD in obtaining the state Search and Seizure Warrant because the Affidavit of MICHAEL C. SPENCER, in support of the state Search and Seizure Warrant, did not identify that FLOYD HICKS was (1) an Indian and (2) that FLOYD HICKS lives on the Fallon Indian Reservation clearly outside the civil and criminal jurisdiction of the State of Nevada. See Affidavit of MICHAEL C. SPENCER, page 1 and 2, lines 22 and 11-13, 15-16, respectfully.

The Plaintiff also believes that MICHAEL C. SPENCER also misled Justice of the Peace WARD in that the observations of the confidential informant were on the Fallon Indian Reservation, where the possession of the Big Horn sheep head is not a violation of tribal law. See Affidavit of MICHAEL C. SPENCER, page 1 and 2, lines 26-28 and 2-4, 5-7, respectfully.

14. Only tribal search warrants for felonies committed off the reservation can be issued by a tribal court judge. See Title 4, Fallon Tribes Law and Order code, §4-40-060(c). The Nevada Game Wardens were investigating only a Gross Misdemeanor (since January of 1989) wherein it was suspected that FLOYD HICKS had killed off the Fallon Indian Reservation (but maybe on another Indian reservation) and possessed illegally (under state law) Big Horn sheep heads from June of 1988. See Affidavit of MICHAEL C. SPENCER to Justice of the Peace WARD, page 1, lines 26-28, dated June 12, 1991.

In addition, it has long been held that police officers cannot rely on bad warrants such as were Game Warden SPENCER misled Justice of the Peace WARD as to the race and residency of the Plaintiff and Tribal Court Judge HAROLD issued a document not authorized by tribal law, allowing SPENCER to serve the tainted state Search and Seizure Warrant. See Quinnette v. Garland, 277 F.Supp. 999 (DC CD Cal. 1967); this case remains good law and the award of nominal damages in that case is not applicable here.

15. In the opinion of the Plaintiff, Nevada Game Warden MICHAEL C. SPENCER intentionally misled Justice of the Peace

WARD as to the race and residency of the Plaintiff. It is entirely likely, given his knowledge of the law and his long time residence in the area, that Justice of the Peace WARD would have rejected issuing his Search and Seizure Warrant if Nevada Game Warden SPENCER had advised, truthfully, that the Plaintiff was an Indian and that his residence was located within the exterior boundaries of the Fallon Indian Reservation.

16. In his application for Justice of the Peace WARD's Search and Seizure Warrant (Affidavit), Nevada Game Warden SPENCER did not state sufficient facts to support the issuance of a valid search warrant. Observation back in June 1988 and only reported January 1989 and not acted on prior to this date are too remote. See Affidavit of Justice WARD, page 1, lines 26-28. "A bedroom" as reported by SPENCER, and attributed to Tribal Police BOB WISE, is too general. The location of the bedroom should have been specified. See Affidavit, page 2, lines 8-13.

The purpose of having eh affiant swear before the tribal judge is so that the tribal judge can see and test the sincerity of the information and reliableness of the confidential informant used by Nevada Game Warden SPENCER. See Wm. E. Ringel, Searches & Seizures, Arrests and Confessions (Clark Boardman Co., Ltd. NY 1972) at §200. The acts of Tribal Court Judge REBECCA HAROLD merely bootstrapped a tainted Affidavit and state Search and Seizure Warrant and forced same upon the Plaintiff; tribal courts should not merely rubber-stamp the actions of state court judges.

17. See Title 4, Fallon Tribes Law and Order Code, §4-40-060(a), (b) and (c) (Search Warrants for Other Jurisdictions). Where another tribe seeks the same, tribal law has special provisions for them. See Id §4-40-060(d).

18. The Affidavit of Nevada Game Warden SPENCER to Justice of the Peace WARD states that the Plaintiff has been in possession of two Big Horn sheep heads since June 1988. Surely there is no concern for the Plaintiff destroying or otherwise disposing of the items given the length of time between the reliableness of SPECNER's Confidential Informant and Game Warden SPENCER acting on the information. As well, Tribal Police lt. BOB WISE did not communicate any emergency situation according to SPENCER's Affidavit.

19. See William L. Prosser, Torts (Hornbook Series, West Pub. Co. 1978) (hereinafter "Prosser") at 73 ("The trespass may be committed not only by entry upon the land, or by casting objects upon it, but also by causing a third person to enter. The defendant may ... lead him to enter by false representations ... or other inducement. . . .")

20. The law of the State of Oregon is much like that of the Fallon Tribes. See Collier v City of Portland, 57 Or.App. 341, 644 P.2d 1139 (1982) (There was a trespass when police entered the Plaintiff's residence without a warrant unless the law provided for an exception which was applicable under the facts of the case.) Title 4, Fallon Tribes Law and Order Code, §4-40-050(d)(4) allows a tribal court judge to recommend to a criminal defendant that they initiate trespass and other civil actions against errant police officers where the criminal defendant unsuccessfully challenges the issuance of the tribal search warrant. See also Walker v. City of Denver, 720 P.2d 619 (Colo.App.1986) (Absent owner's permission, it is a trespass for a police officer to remain on premises longer than is necessary to remove property properly seized.).

Police officers are also liable for trespass based on an unlawful order of a judge. See Prosser, supra, at 74 ("The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however, reasonable, that he is committing no wrong. Thus he is a trespasser although he believes that ... he has ... the legal privilege of entry.").

The law of the Fallon Paiute-Shoshone Tribes does not adhere to the position of the state of Kentucky. See Heinze v. Murphy, 253 Ky. 382, 69 S.W.2d 711 ( ) (It is not a "trespass" for an officer to go upon another's premises in the line of his duty.).

21. See Prosser, supra, at 76 ("Thus it is a trespass to ... make an unpermitted use of [goods], or to move them from one place to another. . . .").

22. See Prosser, supra, at 852 ("But the extension of the remedy has gone even further, and has included proceedings in which there has been interference with property or business, or damage differing in kind from the ordinary burden of defending a lawsuit, such as attachment, ... the search of premises under a warrant . . . .").

23. See Prosser, supra, at 856-857.

24. See Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930) (bringing a mob to the plaintiff's door at night with a treat to lynch him unless he left town). See also Prossor, supra, at 56-57.

APPENDIX I

IN THE TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES

FLOYD HICKS,

Plaintiff,

vs.

REBECCA HAROLD, et al.

Defendants. /

Case No. CV-FT-91-034

AMENDED COMPLAINT

NOW COMES the Plaintiff, Floyd Hicks, through legal counsel, Ronald E. Johnny, for causes of action against Defendants, alleges as follows:

FIRST CAUSE OF ACTION

(Trespass to Land)

1. The plaintiff, Floyd Hicks, is an adult Native American; an enrolled member of the Fallon Paiute-Shoshone Tribes; a citizen of both the state of Nevada and the United States; and, a resident of the Fallon Paiute-Shoshone Indian Reservation.

2. The defendant, Rebecca Harold, is a non-Indian, Nevada state-licensed attorney, is the chief judge of the Fallon Tribal Court, and employee or official of the Fallon Paiute-Shoshone Tribes; the defendant, state of Nevada, is a governmental entity; William Mollini (sic) is the Director of the Nevada Department of Wildlife; the defendants, Michael C. Spencer, Rich Ellington and Bill Fitzmorris, are non-Indians and employed by the state of Nevada as game wardens for the Nevada Department of Wildlife; the defendant Confidential Informant, may be an Indian but may also be a non-Indian; the defendants Robert Wise and Bob Minton, are non-Indians, were, on the dates complained of herein, employees or officials of the Fallon Paiute-Shoshone Tribes and employed as tribal police officers; the defendants John Does I thru X, are either officials and/or employees of the Fallon Paiute-Shoshone Tribes or

the state of Nevada or Churchill County, who assisted in or otherwise made the decision and actions complained of herein.

3. All defendants are being sued in their individual and officials capacities.

4. On or about August 30, 1990 and June 13, 1991, the defendant Michael C. Spencer, also known as "Mike Spencer," executed a three page Affidavit in the matter captioned In The Matter Of The Application For A Search Warrant (Justice Court, New River Township, County of Churchill, State of Nevada).

5. The Affidavits, identified-above, advises that Mike Spencer is investigating a possible crime, the possessing of killing of a big horn sheep of the California subspecies, a gross misdemeanor, in violation of N.R.S. 501.376, involving the plaintiff, Floyd Hicks.

6. The Affidavits, identified-above, advises that the information supplied by defendant, Confidential Informant of Michael C. Spencer, was more than two-years old on August 30, 1900.

7. The Affidavit of Mike Spender issued on or about June 13, 1991, to the Justice of the Peace, New River Township, Churchill County, state of Nevada, did not mention the investigation and/or search and seizure conducted of the plaintiff's premises on or about August 30, 1990.

8. On or about August 30, 1990, Justice of the Peace, Marilyn Craig, issued a document titled "Search Warrant," which advised any police officer in the County of Churchill, state of Nevada, that the Justice Court lacked jurisdiction to issue a search warrant against the plaintiff, Floyd Hicks.

9. On or about June 13, 1991, the Justice of the Peace, New River Township, Churchill County, State of Nevada, issued a document titled "Search Warrant."

10. On August 30, 1990, Justice of the Peace, Marilyn Craig, issued a document titled "Search Warrant," which was not a search warrant.

11. On or about August 30, 1990, and June 13, 1991, the defendant Michael C. Spender, and the state of Nevada, sought legal counsel from the Churchill County District Attorney with regard to his authority to search and seize items of evidence on the Fallon Indian Reservation.

12. On or about June 13, 1991, the defendant, Rebecca Harold, without lawful authority, against specific tribal laws, and under color of law, authorized the defendant, Michael C. Spencer, and state of Nevada, to enter the allotted Indian lands and residence of the plaintiff, Floyd Hicks, and to search and seize the plaintiff's personal property.

13. On or about August 30, 1990, and June 13, 1991, the defendant Michael C. Spencer, and state of Nevada, without lawful authority or permission of the plaintiff, Floyd Hicks, and under color of law, entered the allotted Indian land and residence of the plaintiff.

SECOND CAUSE OF ACTION

(Trespass to Chattels)

14. The plaintiff incorporates paragraphs number 1 through 13 here.

15. On or about June 13, 1991, the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, without lawful authority, and under color of law, searched the residence of the plaintiff, Floyd Hicks, 7755 Stillwater Road, Fallon Indian Reservation.

16. On or about June 13, 1991, the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, while on the plaintiff's allotted Indian lands, without lawful authority, seized, under color of law, the personal property of the plaintiff, to-wit: a 45 year old, mounted, head of a big horn sheep of the Rocky Mountain subspecies.

17. The plaintiff's 45 year old, mounted, head of a big horn sheep of the Rocky Mountain subspecies, was of great personal value to the plaintiff and had great financial value.

18. On or about June 13, 1991, the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, without lawful authority, and under color of law, removed the personal property of the plaintiff, to-wit: 45 year old, mounted, head of a big horn sheep of the Rocky Mountain subspecies, from the residence and allotted Indian lands of the plaintiff and the Fallon Indian Reservation.

THIRD CAUSE OF ACTION

(Violation of Civil Rights Under Federal Law)

19. The plaintiff incorporates paragraphs number 1 through 16 here.

20. On or about June 13, 1991, the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, violated the plaintiff's civil rights under federal law.

FOURTH CAUSE OF ACTION

(Violation of Civil Rights Under Tribal Law)

21. The plaintiff incorporates paragraphs number 1 through 20 here.

22. On or about June 13, 1991, the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, violated the plaintiff's civil rights under tribal custom, tradition and common law which is reflected also in the Law & Order Code of the Fallon Paiute-Shoshone Tribes (1986).

FIFTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress and Mental Harm)

23. The plaintiff incorporates paragraphs number 1 through 22 here.

24. That on or about August 30, 1990 and June 13, 1991, and at times thereafter, the plaintiff attempted to advise all defendants, identified-above, that they were in violation of tribal and federal law.

25. That between August 30, 1990 and this date, the plaintiff has been the subject of much ridicule and fun by many people because of the actions of the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada.

26. That the actions of the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, on or about August 30, 1990, and June 13, 1991, combined, caused the plaintiff to suffer great emotional and mental harm.

27. That the actions of the defendants Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, on or about August 30, 1990, and June 13, 1991, combined, caused the plaintiff to loose his personal property, to-wit: the two, aged, mounted big horn sheep heads of the Rocky Mountain subspecies.

WHEREFORE THE PLAINTIFF PRAYS THE COURT:

1. For the First Cause of Action, Trespass to Land, award the plaintiff $25,000 PLUS punative (sic) damages of $50,000.

2. For the Second Cause of Action, Trespass to Chattels, award the plaintiff $25,000 PLUS punative (sic) damages of $50,000.

3. For the Third Cause of Action, Denial of Civil Rights Under Federal Law, award the plaintiff $250,000 PLUS punative (sic) damages of $1,000,000.

4. For the Fourth Cause of Action, Denial of Civil Rights Under Tribal Law, award the plaintiff $250,000 PLUS punative (sic) damages of $1,000,000.

5. For the Fifth Cause of Action, Intentional Infliction of Emotional Distress and Mental harm, award the plaintiff $1,000,000 PLUS punative (sic) damages of a reasonable sum.

6. For any additional relief to which the plaintiff may be entitled, award the plaintiff a reasonable sum.

7. Pay the plaintiff's attorneys fees and costs of suit.

Respectfully submitted June 1, 1994.
BY: RONALD E. JOHNNY

APPENDIX J

IN THE TRIBAL COURT

IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES

FALLON, NEVADA

FLOYD HICKS,

Plaintiff,

Case No. CV-FT-91-034

vs.

MOTION TO QUASH SERVICE OF PROCESS

Tribal Judge REBECCA HAROLD; STATE OF NEVADA; Director, Nevada Department of Wildlife, WILLIAM MOLLINI; Nevada State Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON, and BILL FITZMORRIS and their CONFIDENTIAL INFORMANT; Tribal Police Officers BOB WISE and BOB MINTON; and JOHN DOES I thru X. and, REBECCA HAROLD, WILLIAM MOLLINI, MICHAEL C. SPENCER, RICK ELLINGTON, BILL FITZMORRIS, CONFIDENTIAL INFORMANT, BOB WISE, BOB MINTON, and JOHN DOES I thru X, individually,

Defendants. /

COME NOW Defendants STATE OF NEVADA; WILLIAM MOLINI, Director, Nevada Department of Wildlife; and MICHAEL C. SPENCER, RICH ELLINGTON, and BILL FITZMORRIS, Nevada State Game Wardens, specially appearing through their attorney, C. WAYNE HOWLE, Deputy Attorney General for the State of Nevada, and move this Court for its order quashing service of process as to said specially appearing Defendants and for no other relief.

This motion is brought pursuant to NRCP Rule 12(b) and is made upon the ground and for the reason that this court lacks jurisdiction over the specially appearing Defendants because (1) the State of Nevada has not consented to suit against it or its officers and employees in this court; and (2) there is insufficient service of process to secure personal jurisdiction over defendants.

This motion is based upon the attached Memorandum of Points and Authorities, and the papers and pleadings of record herein.

POINTS AND AUTHORITIES

Personal jurisdiction is based on a combination of two elements, amenability to jurisdiction, and service of process. Perfumer's Workshop v. Roure Bertrand du Pont, 737 F. Supp. 785, 787 (S.D.N.Y. 1990); Thoenes v. Tatro, 529 P.2d 912, 918 (Or. 1974); Harvey v. Price, 603 F. Supp. 1205 (D. Ill. 1985). Because neither of these factors is present with regard to the defendants who specially appear by this motion, this court lacks personal jurisdiction over them and should issue its order quashing service of process.

(1) The specially appearing defendants are not amendable to the process of the Fallon Tribal Court.

The specially appearing defendants are the State of Nevada and its officers and employees. They are not amenable to the process of this court. The State has waived its immunity to a limited extent as set forth at NRS 41.0305 et seq., but has consented to suit only "in a court of competent jurisdiction of this state." NRS 41.031(2).

The Fallon Tribal Court is not a "court of this state," see Hubert v. City of Acworth, 267 S.E.2d 823 (Ga. App. 1980) ("court of this state" means a court created by the constitution and laws of the state), nor can plaintiff demonstrate otherwise that the Nevada Legislature intended to permit suit against the State in a tribal court. Accordingly, the immunity of the specially appearing defendants prevents this court from asserting its jurisdiction over them.

Further, Plaintiff has pleaded no facts which show that the State has waived its immunity with regard to the claims in the complaint. "To state an actionable claim against the state, a pleader must plead facts in the complaint in avoidance of immunity."

McCann v. State Dep't of Mental Health, 247 N.W.2d 521 (Mich. 1976) (emphasis in original). This also is the rule in Nevada. Taylor v. State of Nev. & Univ. of Nev., 73 Nev. 151, 311 P.2d 733 (1957). See also 81A C.J.S. States § 322 (1977). Plaintiff provides no basis for finding that the State has waived its immunity, but relies instead on unspecified federal law, tribal law[1] and a United States Supreme Court opinion[2], none of which provide any basis for waiver. First Amended Complaint at 3.

The recent opinion of the United States Supreme Court in the case entitled Blatchford v. Native Village of Noatak, ____ S. Ct. ____, 1991 WL 107382 (1991), confirms this court's lack of jurisdiction. Although that decision dealt with a suit against the State of Alaska filed in federal court, the law which the court relied upon to reach its result logically precludes jurisdiction over a state in a tribal court. The Supreme Court first recognized that the "States entered the federal system with their sovereignty intact." Id. at 3. It recognized the full vitality of the states' sovereign immunity based on "traditional principles of immunity." Id. And it concluded that the establishment of a federal court system did not abrogate the states' immunity, even in cases wherein a state is sued by an Indian tribe acting in its sovereign capacity.

A state is no more amenable to suit by a tribe than it is to suit by a foreign country. Id. at 3. One reason is the absence of mutuality which would result by recognition of Indian jurisdiction over states: tribes have not surrendered their immunity from suit by

---

[1] Although the Tribal Code purports to create an implied consent to jurisdiction over persons who appear upon the territory of the Tribe, such consent is not effective to create a waiver of the State's immunity. The acts of the agents of the State cannot waive the State's immunity, for it is "the legislature alone which has the power to waive immunity or to authorize such waiver." Taylor v. State of Nev. & Univ. of Nev., 73 Nev. 2d at 153.

[2] The opinion in National Farmers Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447 (1985), merely holds that objections to tribal jurisdiction must first be made in tribal court. The opinion says nothing about the jurisdiction of tribal courts over the states, and provides no basis for finding a waiver of immunity.

the states, and from this it follows that the states have not surrendered their immunity in suits brought by tribes.

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States [citation], as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Id. at 4.

Because the immunity of the State survives unaltered except by express Congressional action, this court cannot extend its jurisdiction to reach the specially appearing defendants, and the process served should be quashed.

(2) The Eleventh Amendment of the United States Constitution prevents tribal court assertion of jurisdiction over the State, its officers and employees.

Specially appearing defendants rely upon the Eleventh Amendment of the United States Constitution as a separate basis for bringing this Motion to Quash Service of Process. The opinion of the Supreme Court in Blatchford v. Native Village of Noatak, supra, stands primarily for the principle that the Eleventh Amendment bars suits by Indian tribes against States without their consent. Although the Blatchford opinion dealt with a suit filed in federal court, it must also be true that the Eleventh Amendment would similarly preclude the same claim against the state in a tribal court. Any other conclusion would render the opinion of the Supreme Court in Blatchford a virtual nullity.

The Court in Blatchford said:

> Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control . . . . There is . . . the postulate that

> States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.

1991 WL 107382 at 3, quoting from Monaco v. Mississippi, 292 U.S. 313 (1934). Just because the Eleventh Amendment does not expressly set forth the immunity of states from suit in tribal courts does not intend an absence of such immunity. To the contrary, such immunity must be implied; otherwise the immunity from suit by tribes in federal court, determined to exist in Blatchford, would be meaningless.

(3) Specially appearing defendants are protected by the State's immunity and are not subject to the jurisdiction of the court whether named as State employees or individually.

By the Plaintiff's own description of the facts, the Nevada game wardens named as defendants were engaged in their work as law enforcement officers when the claims contained in the complaint are alleged to have arisen. As such the officers are entitled to the immunity set forth at NRS 41.032(2), which makes no distinction between persons named individually and those named as employees of the State. The immunity of the statute extends to employees performing discretionary functions whether or not the discretion involved is abused. Id.

The importance of protecting law enforcement personnel from individual liability was recognized by the United States Supreme Court in Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987). "Permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." 438 U.S. at 638, 107 S. Ct. at 3038. The Supreme Court recognized a qualified immunity for federal law enforcement officers, and held that whether an official may be held personally liable depends on the objective legal reason-ableness of the official's action, assessed in light of legal rules that were clearly established at the time the action was taken, and without regard to his personal belief in the reasonableness of his action.

Applying this rule fashioned by the Supreme Court, the Plaintiff thoroughly fails to set forth any evidence which would

permit this court to exert jurisdiction over the State officials named individually. First, there is no proof, much less allegation, that William Molini, Director, was personally involved in any aspect of the actions giving rise to the claims. Second, the record discloses that the actions of the other individuals were objectively legally reasonable beyond any doubt. The affidavit of Mike Spencer, attached to the complaint as Plaintiff's Exhibit No. 3, sets forth the officer's reliance upon a confidential informant and corroborating information as a basis for the request for a search warrant. The search warrant, attached to the complaint as Plaintiff's Exhibit No. 2, is regular on its face. The Tribal Court order approving the search warrant, Plaintiff's Exhibit No. 1, is duly signed and dated by the Tribal Court Judge. All of the material on file clearly establishes, not that the officials acted in an objectively unreasonable manner, but that they did everything they could to stay within the law. Plaintiff therefore utterly fails in his burden to show that the immunity of Nevada officials should not extend to them as individually named defendants.

The opinion of the Nevada Supreme Court in Edgar v. Wagner, 101 Nev. 226, 699 P.2d 110 (1985), does not dictate a different result. There the court limited the immunity conferred by the statute to actions taken in subjective good faith. The court then ruled that the motion to dismiss the action against a district attorney was improperly granted when the complaint contained bare allegations of malicious actions and bad faith. But several factors distinguish the Edgar decision from the present case. First, the Edgar decision pre-dates the U.S. Supreme Court decision in Anderson v. Creighton. The Nevada court indicated its inclination to follow U.S. law by relying upon it in Edgar, and it would likely accept the objective standard now controlling in the federal courts.

Second, the motion considered by the court in Edgar was one for failure to state a claim, not one to quash service. By definition, a motion brought under NRCP 12(b)(5) deals with bare allegation and not with evidence; but a motion to quash service challenging personal jurisdiction requires plaintiff to make an affirmative showing of personal jurisdiction. Fields v. Sedwick Associated Risks, Ltd., 796 F.2d 299 (9th Cir. 1990). See generally 5A C. Wright & A. Miller, Federal Practice and Procedure (2d ed. 1990) at 248 ("on the motion, plaintiff bears the burden to establish

the court's jurisdiction"). Bare allegation will not suffice, particularly where the record fully supports an absence of malice.

(4) Service of the Summons and Complaint upon the State, its officer and employees was improper and therefore without effect.

Service on the specially appearing defendants was improper because there is no provision in the Fallon Law and Order Code for service outside of the reservation. "In the absence of personal service within the state, jurisdiction over a non-resident can only be obtained if the legislature has provided another method of service of process." 21 C.J.S. Courts § 59. See Williams v. Williams, 433 A.2d 1316 (N.H. 1981), appeal dismissed, 455 U.S. 930 (1982). Service of process from this court outside of its territorial jurisdiction therefore was ineffective by whatever mode, and process against the specially appearing defendants should be quashed for this reason.

CONCLUSION

For the above stated reasons, the specially appearing defendants respectfully request this court to grant their Motion to Quash Service of Process and to enter its Order accordingly.

Submitted: July 18, 1991
BY: C. Wayne Howle
Deputy Attorney General

APPENDIX K

IN THE TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES
FALLON, NEVADA

FLOYD HICKS	**Case No. CV-FT-91-034**
Plaintiff,	**SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SERVICE OF PROCESS**
vs.	
Tribal Judge REBECCA HAROLD, et al,	
Defendants. /	

COME NOW Defendants STATE OF NEVADA; WILLIAM MOLINI, Director, Nevada Department of Wildlife; and MICHAEL C. SPENCER, RICH ELLINGTON, and BILL FITZMORRIS, Nevada State Game Wardens, specially appearing as officials for the State of Nevada and individually through their attorney, C. WAYNE HOWLE, Deputy Attorney General for the State of Nevada, and present this Supplemental Brief as directed by the Court. Defendants do not intend by this appearance a waiver of any immunity or defense which is available to them.

SUPPLEMENTAL POINTS AND AUTHORITIES

The Court has requested briefs assessing the import of two United States Supreme Court cases for the determination of the Motion to Quash Service of Process, filed by specially appearing defendants. Those cases, United States v. Hall, 440 U.S. 410, 99 S. Ct. 1182 (1979), and Hafer v. Melo, ___ U.S. ___, 112 S. Ct. 358 (1991), are discussed below.

I. United States v. Hall, 440 U.S. 410, 99 S. Ct. 1182 (1979).

In Nevada v. Hall, a California resident sued the State of Nevada in a California court for injuries suffered in an accident which occurred in California, involving an employee of the State of Nevada. The Court rejected Nevada's claim of sovereign immunity and allowed Nevada to be sued in the other state's court.

The circumstances of the Supreme Court case differ so significantly from those in the instant action that the opinion in the former cannot be considered controlling on the issue of state sovereign immunity raised in the pending motion. To the extent that it is relevant authority, the Supreme Court's decision supports granting the motion.

A. The decision in "Nevada v. Hall" did not address tribal-state relations.

The question presented in Nevada v. Hall was "whether a State may claim immunity from suit in the courts of another State." 440 U.S. at 415. This presents the first clear difference between Nevada v. Hall and this case: Nevada v. Hall addressed the relationship between states, while this case concerns the relationship between a state and an Indian tribe, thereby raising significant Indian law questions.[1]

The Supreme Court dealt with two discrete, co-equal sovereigns; this case deals with two disparate sovereigns whose authority is overlapping. The differences between the sovereigns are numerous. "The sovereignty that the Indian tribes retain is of a

---

[1] An acknowledged authority has said of the field of Indian law:

> Indian law is an extraordinarily rich and diverse field. The cases, both old and new, weave a fabric with threads drawn from constitutional law, international law, federal jurisdiction, conflict of laws, real property, contracts, corporations, torts, domestic relations, procedure, trust law, intergovernmental relations, sovereign immunity, and taxation. Typically, as those fields meld into Indian law, the blend produces a new variation that could not have been predicted by analysis of the applicable law from those other fields.

F. Cohen, Handbook of Federal Indian Law at p. 1 (1982 ed.). Thus any effort to study the implications of the Supreme Court's Nevada v. Hall decision for the pending motion must proceed with full awareness of the differences created by the presence of Indian law issues in the instant action.

unique and limited character." Rice v. Rehner, 463 U.S. 713, 719 (1982). "Unlike the states, Indian tribes possess only a limited sovereignty that is subject to complete defeasance." Donovan v. Coeur d'Alene Tribal Farms, 751 F.2d 1113, 1115 (9th Cir. 1985). "A tribe's inherent sovereignty . . . is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations.'" Brendale v. Confederated Tribes & Bands of Yakima, 109 S. Ct. 2994, 3005 (1989).

The plaintiff in this case, by naming the State of Nevada and its officers and employees as defendants in an action brought in the tribal forum, raises questions of first impression concerning the external relations of the Tribe with the State. Obviously these questions were not addressed in Nevada v. Hall. Defendants respectfully suggest that a fair review of the relevant Indian law principles which played no part in Nevada v. Hall establishes that the Tribe's sovereignty has been implicitly divested, Duro v. Reina, 110 S. Ct. 2053, 2060 (1990), to the extent that its sovereignty would permit it to disregard the State of Nevada's sovereign immunity.

The Court in Blatchford v. Native Village of Noatak, ___ U.S. ___, 115 L.Ed. 2d 686 (1991), recognized as a "presupposition of our constitutional structure . . . that the States entered the federal system with their sovereignty intact." Under the "plan of the convention," the states subjected themselves to suit by other states and by the United States in federal court. Id. Otherwise, state immunity remains undiminished.[2] There was no submission to suit by Indian tribes in federal court. Id. On the basis of the same presupposition, there can have been no intention in the formation of the Union that tribal sovereignty be in derogation of the states' sovereign immunity in any court within the states' own borders. Because jurisdiction in such a situation is incompatible with the states' sovereign immunity--just as federal court jurisdiction was incompatible with state immunity in Blatchford--the contrary must

---

[2] This is fully consistent with the Court's holding in Nevada v. Hall. It is precisely because the states exist as co-equal sovereigns that the California court was not required to recognize Nevada's claim to sovereign immunity any more so than one sovereign nation would be constrained to recognize another sovereign nation's immunity.

be concluded: that the dependent status of the tribes intends a divestment of the tribal sovereignty insofar as it would otherwise permit suit against the state in which the tribal forum is located.

B. The Plaintiff in "Nevada v. Hall" was not a citizen of the defendant state, and the action was not filed in the State of Nevada.

The Court explained that it would be unfair to require a citizens of California to abide by the State of Nevada's limited liability rules.

> In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect.

440 U.S. at 427.

In stark, obvious contrast, the citizens of the Fallon Paiute Shoshone Tribe, including the plaintiff in this case, are citizens of the defendant state. They have as much say, through their vote, as any other citizen of Nevada in the determination of the extent to which the state will allow itself to be legally liable. Op. Nev. Att'y Gen. 166 (May 2, 1974) (Indians are "entitled to vote in state and county elections provided they comply with statutory requirements which have to be fulfilled by any other voter"). No unfairness is caused by holding the plaintiff subject to that determination; it would be unfair instead to allow him to elude democratically determined limitations of his own state's government by resort to this Tribal Court.

Moreover, in this case, the action was filed within the State of Nevada, in a court located within the exterior boundaries of the State. The jurisdictions of the state and tribal governments are therefore overlapping. Such was not the case in Nevada v. Hall.

An Indian reservation is generally considered to be a portion of the state within which it is located.

> Whenever, upon admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction

> over that reservation, it has done so by express words.

United States v. McBratney, 104 U.S. 621, 623-24 (1881).

Therefore, this is not a case like the one cited by the Court in a footnote, 440 U.S. at 427, n.29, where the interest of one state in property acquired in another state was as a mere proprietor as opposed to a sovereign. In contrast, it is well established that the states retain their sovereignty in Indian country. United States v. McGowan, 302 U.S. 535 (1938). Perhaps the broadest statement of this principle is found in New York, ex rel. Ray v. Martin, 326 U.S. 496, 499, 68 S. Ct. 307, 308 (1946), where the Court held that "in the absence of a limiting treaty obligation or Congressional enactment, each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries." See also Shakopee MDewakanton Sioux v. City of Prior Lake, 771 F.2d 1153, 1156 (1985), cert. denied, 475 U.S. 1011 ("that a tribal government exercises sovereign powers on a reservation and that reservation lands are held in trust by the United States does not prevent the reservation from constituting a portion of a state and a political subdivision of a state"). Nevada thus has a heightened interest in the matter before this court because the land where the acts occurred giving rise to the causes of action against the State are part of the State, located within the State's sovereign jurisdiction. The balance of interests is therefore far different from that in Nevada v. Hall and requires a different determination.

C. Tribal exercise of jurisdiction in this case poses a substantial threat to Nevada's ability to fulfill its sovereign responsibilities.

Liability was allowed against Nevada in Nevada v. Hall in part because it did not impinge on the State's sovereign responsibilities.

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different

state policies, either of California or Nevada, might require a different analysis or a different result.

440 U.S. at 425, n.24.

The circumstances of the present case are not even remotely similar to those referenced in the Court's footnote. The alleged injuries occurred within the State of Nevada, by wardens acting under the State's game laws. The action therefore has far stronger significance for Nevada's exercise of sovereign authority within its own borders.

The regulation of game falls within a state's police powers. "Protection of the wild life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection." Lacoste v. Department of Conservation, 263 U.S. 545, 552 (1924), quoted in Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 392 (1978). Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and general welfare. Marshall v. Kansas City, 355 S.W.2d 877, 883 (Mo. 1966). It is "an indispensible, essential and vital attribute of sovereignty.... [T]he Constitution supposes the preexistence of the police power and must be construed with reference to that fact." 16A Am.Jur.2d Constitutional Law § 360 (1979). Cf. Rice v. Rehner, 463 U.S. at 731 (recognizing state's interest in liquor regulation pursuant to police power as support for state liquor regulation in Indian country).

This action, filed in this tribunal, is an imposition on and impediment to Nevada's sovereign prerogative to carry out its purposes with regard to its wildlife. Wardens must be allowed to enforce the game laws of the State without fear of being held to a standard of liability higher than that which the legislature of the State has determined is appropriate. The State's interest as a sovereign is therefore manifestly greater than in Nevada v. Hall. This distinction, too, requires a determination different from that in Nevada v. Hall.

D. The Fallon Paiute-Shoshone Tribe has retained all sovereign immunity and does not consent to the filing of any suit against it for money damages.

The Court in Nevada v. Hall allowed a California court to impose the same degree of liability on Nevada as it could have

imposed on its own sovereign.

> In further implementation of that policy [protecting those injured on highways], California has unequivocally waived its own immunity from liability for the torts committed by its own agents and authorized full recovery even against the sovereign. As the California courts have found, to require California either to surrender jurisdiction or to limit respondents' recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery.

440 U.S. at 425.

Again the facts in the present case deviate significantly from those of the Nevada v. Hall paradigm. The sovereign in whose court this action is brought has not waived any immunity. The Fallon Paiute-Shoshone Tribe has and retains all

> sovereign immunity and does not consent to the filing of any suit or to the entry of any judgement or order against it, the effect of which is to order the payment of money directly or indirectly.

Law and Order Code of the Fallon Paiute Shoshone Tribe § 1-10-030. This code section indicates that extension of immunity to the State of Nevada would affront no forum policy.

> The power of the Tribe to so restrict its liability is clear. It is well settled that Indian tribes possess the common law immunity from suit in state or federal court traditionally enjoyed by sovereign powers. Indian tribes may not be sued absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress.

Suarez v. Confederated Tribes & Bands of the Yakima Indian Nation, 18 Indian L. Rep. 3120 (E.D. Wash. 1991). "'Without congressional authorization,' the 'Indian Nations are exempt from suit.'" Santa Clara Pueblo v. Martinze, 436 U.S. 56, 59 (1978) (citations omitted).

Moreover, it has been held that tribal immunity operates regardless of where a suit is brought. Val/Del, Inc. v. Superior Ct.

of the State of Ariz., 703 P.2d 502, 504 (Ariz. App. 1985). But see Pueblo of Acoma v. Padilla, 109 S. Ct. 1767 (1989) (Justice White's dissent to Court's denial of petition for writ of certiorari notes difference in state courts concerning the applicability of Nevada v. Hall to determine effect of tribal immunity in state courts).

Nevada itself determines the question of another state's liability by reference to Nevada's own liability for similar acts. Mianecki v. District Ct., 99 Nev. 93, 658 P.2d 422 (1983). Thus under Nevada's own law, NRS 41.032, the instant claims, if brought in a Nevada court against another state, would be barred by comity.

It thus defies all notions of fairness to hold Nevada liable for damages which this court could not award against its own sovereign; which Nevada could not award against a defendant tribe; and which Nevada would not allow in its courts against a foreign state. As a simple matter of fairness, then, Defendants ask that their motion be granted.

CONCLUSION

Nevada v. Hall should not be used as a guide for determining the pending motion, because the opinion of the Supreme Court does not address the significant state-tribal issues involved. To the extent the Nevada v. Hall opinion is referenced, it supports granting the motion because of the disparities in the factual bases for the two cases.

II. Hafer v. Melo, U.S. , 112 S. Ct. 358 (1991).

This case arose when the newly elected Auditor General of Pennsylvania discharged certain employees, who then filed an action in federal court for money damages under 42 U.S.C. § 1983. Section 1983 expressly creates a private cause of action against any person who, acting under color of state law, violates the civil rights of anyone else within United States jurisdiction. The court has ruled, however, that neither a state nor an officer or employee of a state in their official capacity is a "person" against whom an action may be brought. The question in Hafer v. Melo was whether such an officer or employee could be made liable for money damages under § 1983 in their capacity as an individual. The Court answered in the affirmative.

A. Plaintiff's claims are not brought pursuant to statute expressly creating a cause of action based on violation of constitutional rights.

Plaintiff's claims in this case do not rely on 42 U.S.C. § 1983 or the United States Constitution. Instead they rely on the Indian Civil Rights Act (ICRA) and common law tort theories. This makes a significant difference for the outcome.

The Court has held that federal government officials are ordinarily accorded absolute immunity from liability under state tort theories, so long as their actions fall within their discretionary authority. Barr v. Mateo, 360 U.S. 564 (195), Westfall v. Erwin, 484 U.S. 292, 296-97 (1988). The development of liability for officials in their individual capacities as discussed in Hafer has occurred only in the field of constitutional violations.

> If a public officer is acting with proper authority and the acts are "discretionary," the Court in Barr v. Mateo held there is no liability even though the officer acts willfully or maliciously.
>
> The advent of "constitutional torts" in 1971 substantially reduced the scope of the immunity defense in suits against public officers.... Put simply, public officials who violate constitutional rights might be personally liable to the injured person for damages.

Ralph W. Johnson and James M. Madden, Sovereign Immunity in Indian Tribal Law, 12 American Indian Law Review 153, 175-75 (1984). Thus only for certain wrongs is the immunity of government officials qualified.

The protections for wrongs done under the ICRA differ greatly from those afforded under 42 U.S.C. § 1983. Vindication for wrongs done under the ICRA are extremely limited. "Congress has provided no private right of action to enforce the [Indian Civil Rights] Act, other than habeas corpus." Imperial Granite Co. v. Pala Band of Indians, 940 F.2d 1269, 1271, n. 3 (9th cir. 1991). "The structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one." Santa Clara Pueblo v.

Martinze, 436 U.S. at . It is not even clear that the ICRA provides a remedy against a tribal sovereign in its own courts.

> In testimony before the Commission [on Civil Rights], Judge Elbridge Coochise, administrator and chief judge of the Northwest Intertribal Court System, was asked whether he thought the ICRA waived sovereign immunity. He responded in the negative and indicated that it is "something we need to look at and give the tribes the opportunity, like any other government, to say 'Yes, we waive that,' or 'No, we don't.'"

United States Civil Rights Commission, The Indian Civil Rights Act at 67 (June 1991). The Tribe may have waived the absolute immunity of tribal officials in their individual capacities, Fallon Tribal Code § 1-10-40, but this is not equivalent to an express Congressional signal such as the one in § 1983, and implies no waiver of the State's immunities.

In contrast, Congress operated with a now undisputed intent to establish a remedy for individuals whose rights under 42 U.S.C. § 1983 and the Constitution are abused.

> Through § 1983, Congress sought "to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position." Accordingly, it authorized suits to redress deprivations of civil rights by persons acting "under color of any [state] statute, ordinance, regulation, custom, or usage."

Hafer, 112 S. Ct. at 363.

Congress' failure to create an express remedy for ICRA violations like the one it created for constitutional violations justifies different treatment of the immunity question under the ICRA. The qualified immunity exception has no place in the enforcement of the ICRA. Defendants should be measured under the standard rule established in Barr v. Mateo. Under that standard, the individually named defendants are entitled to absolute immunity because they were clearly acting within their discretionary authority under the State's game laws.

B. The defense of reasonable reliance on the law was not addressed in Hafer.

Even if the individually named defendants are not entitled to immunity under the Barr standard, they may still make personal defenses at the earliest stages of litigation, and the court must determine the validity of the defenses even where they involve questions of fact.

> Because the entitlement is an immunity from suit rather than a mere defense to liability, we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.
>
> Immunity ordinarily should be decided by the court [instead of a jury] long before trial.

Hunter v. Bryant, 52 S. Ct. Bull. (CCH) B469 (Dec. 16, 1991) (citations omitted) (emphasis in original). The Hafer opinion is does not speak to the validity of these defenses.

The government official's argument in Hafer was that she could not be made personally liable since she acted within her official capacity when she terminated the plaintiff employees. She did not admit to being an individual defendant, and the Court therefore did not explore "personal immunity defenses such as objectively reasonable reliance on existing law." 112 S. Ct. at 362. Specially appearing individual defendants have made that defense; Hafer offers no guidance on its determination.

The Hafer decision thus did not address the test to be applied when determining whether immunity should be recognized. In Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991), the court enunciated the test when it found two peace officers immune from claims they had violated Indian treaty rights:

> [T]he qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so 'clearly established' as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a

> reasonable officer could have believed lawful the particular conduct at issue.

931 F.2d at 627. Immunity should be given and discovery should not be permitted where the pleadings fail to claim violation of a clearly established right. Id., 931 F.2d at 628, n.6. The pleadings and papers in this case establish no such violation. The law for issuance and execution of search warrants on the Fallon Reservation is not at all clear, as the pleadings indicate; and rights and remedies under the ICRA are unclear, in view of Santa Clara Pueblo v. Martinez.

Nor has plaintiff alleged violations of law with sufficient specificity. "Mere allegations of malice do not destroy qualified immunity.... The complaint must... allege specific facts demonstrating that the actions of the individual state defendants were objectively unreasonable." Bellamy v. Borders, 727 F. Supp. 247 (D.S.C. 1989). The only specific allegation in plaintiff's complaint is that the officers failed to leave a copy of the warrant with the plaintiff. However:

> [A] search and seizure is not illegal if irregularities in the procedure do not affect the substantial rights of the accused.... As a general rule, statutes which require peace officers to exhibit or deliver a copy of the search warrant at the place to be searched are viewed as ministerial only and failure to comply with such statutes does not void an otherwise valid search.

State v. Chatriand, 792 P.2d 1107, 1108-09 (Mont. 1990). See also United States v. Klapholz, 17 F.R.D. 18 (S.D.N.Y. 1955) ("'if the search warrant was valid and the original entry lawful, we cannot agree with the contention that the search was rendered unlawful by the mere failure of the officers to leave a copy of the warrant," quoting Giacolone v. United States, 13 F.2d 108 (9th Cir. 1926). Cf. People v. Gifford, 782 P.2d 795, 797, n.2 (Colo. 1989) ("presentment of the warrant prior to the commencement of the search is not an absolute constitutional requirement").

Moreover, defendants rely on plaintiff's own exhibits, attached to the complaint, as prima facie, unrebutted evidence of defendants' objective good faith. It is necessary for plaintiff to put forth evidence establishing an issue of fact regarding the defendants' alleged malicious intent or bad faith. Yet there is no

competent evidence in the record by way of affidavit or otherwise to support the claims.

None of these principles delimiting immunity were addressed by the Court in Hafer, and that case does little to elucidate or elaborate on them.

CONCLUSION

The decision in Hafer stands only for the proposition that officials can be made personally liable in their individual capacities in actions brought pursuant to 42 U.S.C. § 1983. It does not evaluate the merits of a reasonable reliance defense. The holdings of the decision therefore contribute little to decision on the pending motion, since the case before the court does not involve a § 1983 claim, and it raises a claim of reasonable reliance.

DATED January 21, 1992.

BY: C. Wayne Howle
Deputy Attorney General

APPENDIX L

CASE NO. CV-FT-91-034
CV-FT-92-031

IN THE FALLON TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES
FALLON, NEVADA

FLOYD HICKS,
Plaintiff,

vs.

REBECCA HAROLD, et al.,
Defendant /

ORDER QUASHING SERVICE OF PROCESS AS TO SPECIALLY APPEARING STATE DEFENDANTS

The State Defendants' Motion to Quash Service of Process having come before this Court for decision, a hearing having been held on Marc 3, 1993, on the Fallon Indian Reservation, the presentments of the parties having been considered, the Court deeming itself fully advised in the premised [sic] and good cause appearing;

The Court finds that it is not prevented by doctrines of sovereign or qualified immunity from lawfully exerting personal jurisdiction over the specially appearing State Defendants in this action. The actions of the State Defendants within the exterior boundaries of Fallon Indian country and the decision set forth in National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985), wherein a school district was named in an action in tribal court, is authority relied on by this Court to hold that state immunity defenses do not bar actions against states and state subdivisions, as well as their officers and employees, in tribal courts.

The Court further finds that it is without jurisdiction over the persons of the specially appearing State Defendants for the reason that the Business Council of the Fallon Paiute-Shoshone

Tribes has enacted no procedure for service outside of its territorial jurisdiction by Certified U.S. Mail, rendering any such service void. There being no proof of service on file showing that the Court's service of the specially appearing State Defendants was made on the Fallon Indian Reservation or Colony, or in accordance with Nevada Rules of Civil Procedure (N.R.C.P.), Rule 4, adopted by Tribal Law, service on the specially appearing State Defendants by Certified U.S. Mail fails.

IT IS THEREFORE ORDERED that the State Defendants' Motion be, and hereby is, GRANTED, and that process as to the specially appearing State Defendants is hereby quashed; and that no other relief by granted.

[Signed] Joseph Van Walraven, Tribal Judge.
[Filed] May 5, 1993.

Supreme Court, U.S.
FILED
JUL 12 2000
CLERK

(2)

No. 99-1994

In The

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,

Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS THE TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES AND THE HONORABLE JOSEPH VAN WALRAVEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MELODY L. MCCOY
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

July 12, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does an Indian tribal court have jurisdiction under federal law over civil actions arising on the trust allotment land of a tribal member and brought by the tribal member against state officials in their individual capacities for alleged violations of federal civil rights and tribal tort law?

2. Assuming that there is tribal jurisdiction, are the merits of the officials' claimed federal law affirmative defenses of absolute and qualified immunity subject to exhaustion in tribal court?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

INTRODUCTION 6

REASONS THE WRIT SHOULD BE DENIED 6

I. THE COURT OF APPEALS CORRECTLY APPLIED EXISTING FEDERAL LAW WHICH MAKES CLEAR THAT THERE IS TRIBAL JURISDICTION IN THIS CASE 6

A. At Least Since *Montana v. United States*, 450 U.S. 544 (1981), This Court Has Held That Tribes Generally Have Civil Jurisdiction Over The Conduct Of Non-Indians On Indian Trust Land 6

B. Congress Has Not Excepted The Tribal Jurisdiction At Issue Here From This Presumption Of Jurisdiction 12

C. It Is Well-Settled That State Sovereign Immunity From Suit Does Not Operate To Bar Actions Such As Those In The Instant Case Which Are Brought Against Officials Solely In Their Individual Capacities 17

II. ASSUMING *ARGUENDO* THAT THERE IS TRIBAL JURISDICTION, THE PROCEDURAL RULINGS BY THE COURT OF APPEALS REGARDING ADJUDICATION OF THE AFFIRMATIVE DEFENSES ARE CONSISTENT WITH THIS COURT'S DECISIONS IN THE AREAS OF JUDICIAL CIVIL PROCEDURE AND THE TRIBAL EXHAUSTION RULE 22

TABLE OF CONTENTS – Continued

Page

A. It Is Firmly Established That Affirmative Defenses Are Non-Jurisdictional Issues 23

B. To Ensure Uniformity Of Federal Law, Federal Court Review After Exhaustion In Tribal Court Of The Section 1983 Affirmative Defenses Is Appropriate 24

C. The Affirmative Defenses Have Not Been Exhausted In This Case Because The Tribal Court Has Not Yet Ruled On The Merits Of The Defenses 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996) (*en banc*) 7, 9, 10

Alden v. Maine, 527 U.S. 706 (1999)..... 20

Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970) 21

Atkinson Trading Co., Inc. v. Shirley, 210 F.3d 1247 (10th Cir. 2000)..... 8, 10, 11, 12, 13

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989)..... 14

Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)..... 14

City of Timberlake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (10th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994)..... 25

County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) (*en banc*) 12, 13

Crawford-El v. Britton, 523 U.S. 574 (1998) 24

Duro v. Reina, 495 U.S. 676 (1990)..... 17

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999)..... 8, 15

Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945)..... 18, 21

Gomez v. Toledo, 446 U.S. 635 (1980)..... 16, 23

Hafer v. Melo, 502 U.S. 21 (1991) 18, 19, 21, 23

Harlow v. Fitzgerald, 457 U.S. 800 (1982).. 19, 20, 23, 24

TABLE OF AUTHORITIES – Continued

Page

Hicks ex rel. Feiock v. Feiock, 485 U.S. 624 (1988) 25

Howlett v. Rose, 496 U.S. 356 (1990) 16

Hunter v. Bryant, 502 U.S. 224 (1991) 24

Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) 25

Jefferson County v. Acker, 527 U.S. 423 (1999) 23

Johnson v. Fankell, 520 U.S. 911 (1997) 19

Kennerly v. District Court, 400 U.S. 423 (1971) 13

Kentucky v. Graham, 473 U.S. 159 (1985) 20

Malley v. Briggs, 475 U.S. 335 (1986) 20, 23

Martinez v. California, 444 U.S. 277 (1980) 16

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 7

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) .. 14, 16

Mitchell v. Forsyth, 472 U.S. 511 (1985) 24

Mitchum v. Foster, 407 U.S. 225 (1972) 16

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 16

Montana v. United States, 450 U.S. 544 (1981) .... *passim*

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 847 (1985) 15, 17, 18, 25

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 8, 10

TABLE OF AUTHORITIES – Continued

Page

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) 19

Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993) 7

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 17, 18

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 7

Rice v. Rehner, 463 U.S. 713 (1983) 17

Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) 25

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ..7, 15

Siegert v. Gilley, 500 U.S. 226 (1991) 24

South Dakota v. Bourland, 508 U.S. 679 (1993) 10, 17

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 5, 7, 9, 10, 18

United States v. N.Y. Rayon Importing Co., 329 U.S. 654 (1947) 13

United States v. Wheeler, 435 U.S. 313 (1978) 14

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 17

Webster v. Reproductive Health Service, 492 U.S. 490 (1989) 18

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 20

Williams v. Lee, 358 U.S. 217 (1959) 14, 15, 21

TABLE OF AUTHORITIES – Continued

Page

Wood v. Strickland, 420 U.S. 308 (1975) 19

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 7

CONSTITUTIONS, STATUTES, AND COURT RULES

U.S. Const. art. I, § 8, cl. 3 7

Act of Apr. 30, 1908, 35 Stat. 70, 85..... 1

18 U.S.C. § 1151(c) 7

25 U.S.C. § 1321..... 13

25 U.S.C. § 1326..... 13

25 U.S.C. § 3601(5) 15

42 U.S.C. § 1983..... *passim*

Sup. Ct. R. 10 13

EXECUTIVE MATERIALS

U.S. Department of the Interior, Bureau of Indian Affairs, Office of Trust Responsibilities, *Annual Report of Indian Lands* (Sept. 30, 1985)..... 1

STATEMENT OF THE CASE

Floyd Hicks is an enrolled member of the Fallon Paiute-Shoshone Tribe. The Tribe is a federally recognized Indian tribe that exercises its sovereignty according to a federally approved Constitution. The Tribe has about 918 members. The Tribe's Reservation, located in western central Nevada, consists of about 8,000 acres. At least since the Reservation was established, this land has been held continually by the federal government in trust for the Tribe and for individual tribal members. *See* Act of Apr. 30, 1908, 35 Stat. 70, 85; *see also* U.S. Department of the Interior, Bureau of Indian Affairs, Office of Trust Responsibilities, *Annual Report of Indian Lands* 23 (Sept. 30, 1985). The Reservation has never been disestablished, diminished, or opened by act of Congress.

This case arises out of two separate but related incidents which indisputably occurred within the Reservation on Hicks' trust allotment. On August 30 1990, Nevada State officials entered the allotment, conducted a search, and seized Hicks' aged, mounted big horn sheep's head. Pet. at 3. On June 13, 1991, the Officials again entered the allotment, searched Hicks' residence, and seized another of his aged, mounted big horn sheep's heads. *Id.*

The Officials – Michael Spencer, Rich Ellington, and Bill Fitzmorris – are or were Game Wardens employed by the Nevada Department of Wildlife. They were investigating Hicks for an alleged crime under Nevada law occurring off the Reservation – the unlawful possession or killing of a big horn sheep of the California subspecies. Pet. at 3. Based on information obtained in January 1989

from a "Confidential Informant," the sheep was allegedly "freshly killed" in June 1988. Pet. App. at E-1 – E-2.

The first incident began when Spencer executed an affidavit and applied for a state search warrant. Pet. App. at E-1 – E-2. A State Court issued the warrant with the explicit caveat that, "[t]his Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute-Shoshone Tribes." Pet. App. at G-1.

The Tribal Court approved the warrant with the express condition that any search be limited "to exterior premises only and to vehicles thereon." Pet. App. at G-1. Accompanied by a tribal police officer, Spencer entered Hicks' trust allotment. After a search, Spencer seized from Hicks' vehicle a forty year old, mounted sheep's head of the Rocky Mountain subspecies. Pet. at 3. The head was taken off the Reservation and later determined not to be evidence of any crime. It was eventually returned to Hicks, but in an allegedly damaged condition. *Id.*

Ten months later, the second incident began when Spencer obtained another state search warrant to investigate Hicks for the same alleged illegal "fresh kill." Pet. App. at F-2 – F-4. With Tribal Court approval of the warrant and accompanied by tribal police, Spencer, Ellington, and Fitzmorris entered Hicks' allotment. Pet. App. at F-1. A search of Hicks' residence lead to the seizure of another of Hicks' forty year old, mounted sheep's head of the Rocky Mountain subspecies. Pet. at 3.

Again, the head was taken off the Reservation and determined not to be evidence of any crime. This head also eventually was returned to Hicks, but in an allegedly damaged condition. *Id.*

No charges against Hicks were ever brought by the State of Nevada, and the State has apparently ceased its investigation of him.

In July 1991, Hicks filed a civil action in Tribal Court for money damages for injuries allegedly sustained as a result of the conduct of state and tribal officials on June 12-13, 1991.[1] Pet. App. H-1 – H-17. Named as defendants were, *inter alia*, William Molini, Director of the Department of Wildlife, and Spencer, Ellington, and Fitzmorris. *Id.* at H-1. The defendants were named in both their official and their individual capacities. *Id.*

In June 1992, Hicks filed a second civil action in Tribal Court for money damages for injuries allegedly sustained as a result of the conduct on August 30, 1990 of, *inter alia*, Spencer in his official and individual capacity. *See* Pet. at 3 n.3.

Both actions alleged causes of action under tribal common law torts and violations of federal civil rights remediable pursuant to 42 U.S.C. § 1983. Pet. at 4; Pet. App. at I-4. On May 5, 1993, the Tribal Court granted the Officials' Motion to Quash in these actions on the ground of ineffective service of process under tribal law. Pet. App. at L-1 – L-2.

---

[1] All claims by Hicks against the tribal officials ultimately were either voluntarily dismissed by Hicks or were resolved by the Tribal Court in favor of the tribal officials.

Cross-appeals followed to the Western Nevada Inter-Tribal Court of Appeals, of which the Tribe is a member. On May 13, 1994, a three-judge panel of the Inter-Tribal Court of Appeals reversed the Tribal Court on the service of process issue and upheld tribal jurisdiction over the actions. Pet. App. at C-1 – C-8. The cases were remanded back to the Tribal Court where they since have been stayed pending final federal court disposition of the question of tribal jurisdiction. *See* Pet. App. at B-4.

The Officials sought declaratory and injunctive relief in federal district court on the issue of tribal jurisdiction. Pet. at 4. They did not pursue in federal court their claims of ineffective service of process. *See* Pet. App. at A-20 n.3 & B-5 – B-6. In addition to Hicks, the Officials named as defendants the Tribal Court and the Associate Tribal Judge. *Id.* at B-1. Hicks and the Tribe filed answers, with the Tribe attaching a limited waiver of sovereign immunity from suit. *See* Pet. App. at A-20 n.2 & B-4. The case was presented to the district court on cross-motions for summary judgment.[2] *Id.* at B-4. On October 1, 1996, the Officials' summary judgment motion was denied and Hicks' and the Tribe's motions were granted. *Id.* at B-1 – B-24; *Nevada v. Hicks*, 944 F.Supp. 1455 (D.Nev. 1996). The district court upheld tribal jurisdiction both under a presumption of tribal jurisdiction which, in the court's view, had not been defeated in this case, and in the alternative,

---

[2] Before federal district court disposition of the case occurred, Hicks moved in Tribal Court to drop the State of Nevada and all state parties in their official capacities as defendants to his actions there. The Tribal Court granted these motions also before federal court disposition of the case. *See* Pet. App. at A-5 & B-4.

under a presumption against tribal jurisdiction which the court found had been defeated in this case. Pet. App. at B-12.

The Officials appealed to the Court of Appeals for the Ninth Circuit. On May 20, 1997, the three-judge panel requested supplemental briefing from the parties on the effect of this Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *See* Pet. App. at A-6. After oral argument on October 7, 1997, the three-judge panel withdrew the case from submission. *See id.* at A-1. The case was resubmitted on November 4, 1999, and on November 9, 1999, a majority of the panel affirmed that there is tribal jurisdiction over Hicks' claims against the Officials in their individual capacities. *Id.* The panel majority upheld tribal jurisdiction under the presumption of tribal jurisdiction and the majority's conclusion that the presumption had not been defeated in this case. Pet. App. at A-11 – A-12. Judge Rymer dissented. *Id.* at A-16 – A-19. She was of the view that the presumption against tribal jurisdiction applied to the case, and that the presumption had not been defeated. *Id.* at A-17 – A-19. The panel issued an amended opinion on January 24, 2000, largely to clarify that the panel majority did not intend to make any rulings on the merits about the alleged misconduct or liability of the Officials. *Id.* at A-1 – A-23; *Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 2000). The Officials' petition for rehearing was denied and their suggestion for rehearing *en banc* was rejected on March 9, 2000. Pet. App. at D-1.

INTRODUCTION

Petitioners seek review of the Court of Appeals' decision below sustaining the jurisdiction under federal law of a Tribal Court to hear civil actions arising on the trust allotment land of a tribal member and brought by the tribal member against State officials in their individual capacities for alleged violations of federal civil rights and tribal tort law. The decision addressed the federal Indian law jurisdictional issue on the merits. The decision also held that the Officials' claimed affirmative defenses of absolute and qualified immunity were subject to exhaustion in the Tribal Court in the first instance but had not yet been exhausted in this case. Because the Court of Appeals fully considered and correctly decided both the jurisdictional issue and the procedural issue in this case, there is no need for review by this Court.

REASONS THE WRIT SHOULD BE DENIED

I. THE COURT OF APPEALS CORRECTLY APPLIED EXISTING FEDERAL LAW WHICH MAKES CLEAR THAT THERE IS TRIBAL JURISDICTION IN THIS CASE

A. At Least Since *Montana v. United States*, 450 U.S. 544 (1981), This Court Has Held That Tribes Generally Have Civil Jurisdiction Over The Conduct Of Non-Indians On Indian Trust Land

It is undisputed that in this case the underlying Tribal Court actions arose within an Indian reservation on the trust allotment of a tribal member. Such land is Indian

trust land "controlled by a tribe." Pet. at 24; *see also* 18 U.S.C. § 1151(c) (defining Indian trust allotments as Indian country); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993) (holding that trust allotments are Indian country). Indian trust lands are geographic territories and sovereign jurisdictions separate from the States. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670-671 (1974), *quoting Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-561 (1832).[3] Thus, "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 170-171 (1973). Along this same line, unless Congress provides otherwise, "tribes retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997), *citing Montana v. United States*, 450 U.S. at 544, 557 (1981).

The Court of Appeals began its analysis of tribal jurisdiction by noting that "the incidents underlying the instant case occurred on Indian-owned, Indian-controlled land, over which the Tribe retained its right to exclude non-members." Pet. App. at A-9. Petitioners posit that this approach is contrary to this Court's decision in *Montana v. United States*. Pet. at 24-26. Petitioners also proffer a "conflict" between the Court of Appeals' decision below on this point and that in *A-1 Contractors v. Strate*,

---

[3] Petitioners' claim, Pet. at 9, that, to allow the underlying actions to proceed in Tribal Court would "deeply wound" the federalism of the Constitution, is incorrect. Tribal sovereignty pre-dates the Constitution and is recognized in it. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); U.S. Const. art. I, § 8, cl. 3.

76 F.3d 930 (8th Cir. 1996) (*en banc*), and/or that in *Atkinson Trading Co., Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000). Both of these arguments are without merit.

In *Montana v. United States*, this Court upheld tribal authority to regulate the hunting and fishing activities of nonmembers on "land belonging to the Tribe or held by the United States in trust for the Tribe." 450 U.S. at 557. The Court simultaneously refused to allow tribal regulation of hunting and fishing by nonmembers on land owned in fee simple by the nonmembers. *Id.* at 557-567. The Court found, in addition to alienation from Indians by Congress of the land itself, evidence of congressional intent to divest generally tribal power over nonmembers on that land. *Id.* at 557-564; *see also* Pet. at 24 (conceding that the ruling against tribal jurisdiction in "*Montana* . . . involved regulation of nonmember activities occurring on non-tribal land within a reservation."). In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the Court held that tribal hunting and fishing regulatory authority over nonmembers in that case was exclusive of state authority, largely because the land there was Indian trust land and not "non-Indian land." 462 U.S. at 325-331.

This Court recently has unequivocally affirmed that land status is a threshold issue for analyzing tribal adjudicatory jurisdiction. As with tribal regulatory jurisdiction, a presumption in favor of tribal court jurisdiction generally applies where actions arise on Indian trust land. *See, e.g., El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (refusing to apply the test for tribal jurisdiction over nonmember conduct on land alienated from Indians by Congress to "the events in question here [which] occurred on tribal lands."). A presumption

against tribal court jurisdiction generally applies to actions arising on land that has been alienated from Indians by Congress. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. at 456-459. Petitioners try to show "two competing lines of authority from this Court" on this point, Pet. at 25, but the Court's cases are quite consistent with each other and the decision below fits squarely within them.

Nor is there any conflict within the lower federal courts on this point. It is true as Petitioners point out, Pet. at 25, that in *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996) (*en banc*), a majority of the Court of Appeals for the Eighth Circuit was of the view that the presumption against tribal jurisdiction over nonmembers applied "on *any* land within a reservation." *Strate v. A-1 Contractors*, 520 U.S. at 448 (emphasis added). When this Court reviewed that decision however, while it ultimately affirmed the Court of Appeals' judgment against tribal jurisdiction, *it also set forth the correct analysis on this point which reaffirms the importance of land status in analyzing tribal jurisdiction.* Indeed, this Court's finding against tribal jurisdiction in *Strate v. A-1 Contractors* was based precisely on the Court's application of the presumption against tribal jurisdiction which in turn was triggered by the Court's conclusion that the land there – a state highway maintained pursuant to an easement granted under a federal right-of-way statute – was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." 520 U.S. at 454.

This Court's decision on this point in *Strate* replaces that of the Court of Appeals there. For Petitioners to try

to resurrect the Court of Appeals' decision in *Strate* in the name of an inter-circuit conflict is disingenuous.[4]

Likewise, the decision below does not conflict with that in *Atkinson Trading Co., Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000). The issue in *Atkinson Trading Co.* was whether a tribe could tax the activities of a nonmember occurring on land within a reservation but "held in fee simple" by the nonmember. 210 F.3d at 1249. The Court of Appeals in *Atkinson Trading Co.* upheld the tribal tax. *Id.* at 1264. In so doing, the Court of Appeals applied the presumption against tribal jurisdiction, and also found

---

[4] As noted by Petitioners, Pet. at 25, a case relied upon by the majority of the *en banc* Court of Appeals in *A-1 Contractors v. Strate* for its misunderstanding of this Court's rules regarding tribal jurisdiction over nonmembers is *South Dakota v. Bourland*, 508 U.S. 679 (1993). *South Dakota v. Bourland* involved tribal regulation of nonmember hunting and fishing on land taken by the federal government for a flood control project under specific acts of Congress. 508 U.S. at 683-687. As in *Montana v. United States*, this Court in *Bourland* found that by these acts Congress had intended to divest the tribe's power to regulate the nonmembers on this land. *Id.* at 688-694.

The Court's statement in a footnote in *Bourland* that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation . . . ' " is a direct quote from the portion of *Montana* dealing with nonmembers on land owned in fee by the nonmembers. 508 U.S. at 695 n.15. Properly read, this statement must be limited to those cases where there has been divestment of tribal powers by Congress such as in the alienated lands situation. To construe it otherwise would render the portion of *Montana* dealing with Indian trust land – where tribal jurisdiction over nonmembers was upheld notwithstanding the absence of a congressional delegation of power – in conflict with *Montana* itself, as well as with cases such as *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 330-331.

that one of the presumption's exceptions, as set forth in *Montana v. United States*, 450 U.S. at 565-566, applied in that case – the nonmember had entered into a "consensual relationship" with the tribe sufficient to sustain the tax. 210 F.3d at 1261-1264.

But nothing in *Atkinson Trading Co.* conflicts with the Court of Appeals' application in the instant case of the presumption in favor of tribal jurisdiction to nonmember conduct occurring on Indian trust land. Firstly, there was no issue of tribal jurisdiction over nonmember conduct on Indian trust land involved in *Atkinson Trading Co.* The sole issue there was whether a tribe could tax nonmember activity on non-Indian fee land. Any statements by the Court of Appeals in *Atkinson Trading Co.* about tribal jurisdiction over nonmembers on trust land are thus not relevant to the court's decision there; they are dicta and do not give rise to a conflict worthy of granting *certiorari.*

Secondly, the Court of Appeals in *Atkinson Trading Co.* expressly stated that "[o]ur position is not that fee status is irrelevant." 210 F.3d at 1258 n.11.

> Fee status is largely inconsequential in this case simply because the Navajo Hotel Occupancy tax is not a severe imposition upon Appellant's guests and because the subject matter of the tax was more a commercial transaction than one affecting the actual use of Appellant's land. In sum, fee status is plainly relevant in applying the *Montana* standard and its exceptions, but it is not determinative to the extent that the analysis of the Supreme Court turns on that point alone.

Id. This clarifies that the Court of Appeals in *Atkinson Trading Co.* was actually indicating that there might be instances in which a presumption in favor of tribal jurisdiction applies to cases arising on fee land. But that indication does not cast doubt on, let alone conflict with, the Court of Appeals' decision in the instant case to apply that presumption to a case arising on Indian trust land.

B. Congress Has Not Excepted The Tribal Jurisdiction At Issue Here From This Presumption Of Jurisdiction

As stated above, actions arising on Indian trust land such as the present one trigger a presumption in favor of tribal court civil jurisdiction. Although Petitioners disagree, *see* Pet. at 16-17, the Court of Appeals in this case conducted a thorough examination for action by or intent of Congress to except the tribal jurisdiction at issue here from this presumption. Pet. App. at A-8 – A-12. The Court of Appeals searched carefully for federal statutes, agreements,[5] or other evidence of divestiture of or

---

[5] In *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (*en banc*), the Court of Appeals held that the law enforcement agreement between the tribe and a county in that case was the equivalent of a congressional diminishment of tribal power such that the presumption against tribal jurisdiction over nonmembers set forth in *Montana v. United States*, 450 U.S. at 554-567, applied to determine tribal jurisdiction in that case. 163 F.3d at 514. Petitioners here question why the Tribal Court's approval of State Court search warrants in the instant case does not likewise trigger the application of the presumption against tribal jurisdiction. Pet. at 16. To the extent that the decision below is in conflict with *County of Lewis v. Allen*, such an intra-

limitations on tribal sovereignty, exclusionary powers, or landownership control.[6] *Id.* Finding no such

---

circuit conflict generally is not grounds for a grant of *certiorari* by this Court. *See* Sup. Ct. R. 10.

In any event, there is no conflict and Petitioners' analogy of the cases is flawed. The agreement in *County of Lewis v. Allen* was executed pursuant to a specific act of Congress, known as Public Law 280. Among other things, Public Law 280 provides for certain state criminal jurisdiction over Indians within reservations. *See* 25 U.S.C. § 1321. As required by Public law 280, the tribe in *County of Lewis v. Allen* took legislative action – an act of the tribal council – to enter into the agreement. This Court has held that the grant of state authority under Public Law 280 can only be effectuated by following its provisions. *Kennerly v. District Court,* 400 U.S. 423 (1971) (actions by tribe and state inconsistent with Public Law 280 provisions do not vest state with jurisdiction over Indians in Indian country).

Public Law 280 is not involved in the instant case. Nor has the Tribe here otherwise taken legislative action regarding the state's authority on the Reservation. It has long been established in Anglo-American law that only the legislative branch can waive a sovereign's immunity from suit. *See, e.g., United States v. N.Y. Rayon Importing Co.,* 329 U.S. 654, 660 (1947) (officers cannot waive sovereign immunity). Similarly, a judicial officer cannot generally diminish sovereign authority *vis-a-vis* a foreign sovereign. That is the prerogative of the legislature, as Congress recognized in Public Law 280. *See* 25 U.S.C. § 1326.

[6] Petitioners allege that the Court of Appeals erroneously made land status the sole factor in analyzing tribal jurisdiction over nonmembers. Pet. at 16-17. That allegation is incorrect. The Court of Appeals properly recognized that the analysis must include a search for divestment or limitation by Congress, *regardless of whether the land on which the nonmember conduct occurs is under tribal control or not.* Pet. App. at A-8 – A-12; *accord Atkinson Trading Co. v. Shirley,* 210 F.3d at 1261.

In fact, where land has been alienated from Indians by Congress, this Court often concludes that Congress generally

congressional action or intent, the Court of Appeals correctly concluded that "the tribal court has subject matter jurisdiction over the . . . [underlying actions.]" *Id.* at A-12. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("until Congress acts, the tribes retain their existing sovereign powers."); *Williams v. Lee*, 358 U.S. 217, 233 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. If this power is to be taken away from them, it is for Congress to do it.").[7]

The underlying actions in this case arise both under tribal law and under federal law. Petitioners have not

---

intended to divest or limit tribal jurisdiction over nonmember conduct on that land. *See, e.g., Montana v. United States*, 450 U.S. at 557-564. Correspondingly, where the land remains unalienated by Congress, the Court recognizes that tribal sovereignty remains particularly strong. *See, e.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 438-444 (1989) (opinion of Stevens, J.) (announcing judgment of Court upholding tribal authority over "closed" Indian lands, as distinct from "open," largely alienated lands). It is thus significant that Congress has never disestablished, diminished, or opened this Tribe's Reservation. *Compare Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (describing the allotment, cession, and public sale of an Indian reservation's lands).

[7] The requirement of congressional divestment also responds to Petitioners' point that tribes did not historically exercise adjudicatory jurisdiction over state officers in their individual capacities. Pet. at 9-10. As this Court has held, tribes do not lose their sovereign powers through non-use. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) ("Without regard to its source, sovereign power, even when unexercised, is an enduring presence that . . . will remain intact unless surrendered in unmistakable terms.").

argued and cannot argue in this case that Congress has divested tribal court jurisdiction over claims arising under tribal law. Tribes "have power to make their own substantive law . . . and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978), *citing, inter alia, Williams v. Lee*, 358 U.S. 217; *see also* the Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601(5) ("tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments.").

Petitioners do argue to this Court that 42 U.S.C. § 1983 divests tribal court jurisdiction to adjudicate claims arising under federal law and remediable by Section 1983. Pet. at 11-12. This argument is contrary to this Court's very recent pronouncement that, unless Congress provides otherwise, "tribal courts, like state courts, can and do decide questions of federal law." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. at 486 n.7, *citing Santa Clara Pueblo v. Martinez*, 436 U.S. at 65 ("tribal courts available to vindicate federal rights"); *see also National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 847, 852 (1985) (tribal courts can address issues such as limitations on their jurisdiction that arise under and ultimately "must be answered by reference to federal law.").

Petitioners show no evidence in 42 U.S.C. § 1983 of the requisite congressional intent. *Compare El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. at 482-487 (construing an express statutory provision preempting state court jurisdiction over nuclear tort claims as evidence of congressional intent also to preempt tribal court jurisdiction over such claims). Rather, Petitioners' theory is simply that

"[s]ilence in the congressional debates about tribal court's [sic] authority . . . can only signify absence of such intent" to allow tribal jurisdiction. Pet. at 11. This theory cannot withstand a fundamental principle of federal Indian law: "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.").[8]

---

[8] Furthermore, 42 U.S.C. § 1983 addresses significant federal policies by ŏpening "the federal courts to private citizens, [and] offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). This Court has noted the strong congressional policy of having this federal remedy be enforced and enforceable in courts of general jurisdiction. *See, e.g., Martinez v. California*, 444 U.S. 277, 283 n.7 (1980) (finding concurrent state court jurisdiction over Section 1983 suits); *see also Howlett v. Rose*, 496 U.S. 356 (1990) (the Supremacy Clause and Section 1983 preempt state law sovereign immunity defenses inconsistent with Section 1983). Given its strength and importance, the pursuit of federal remedies under 42 U.S.C. § 1983 in tribal courts is consistent with Congress' intent in enacting the law. It thus makes little sense to treat the operation or construction of 42 U.S.C. § 1983 in tribal courts differently than those in federal or state courts, as Petitioners suggest. Pet. at 12. "As remedial legislation, § 1983 is to be construed liberally to further its primary purpose." *Gomez v. Toledo*, 446 U.S. 635, 638 (1980).

C. It Is Well-Settled That State Sovereign Immunity From Suit Does Not Operate To Bar Actions Such As Those In The Instant Case Which Are Brought Against Officials Solely In Their Individual Capacities

Unable to prove divestment of tribal jurisdiction by Congress, Petitioners resort to arguing that tribal jurisdiction in this case is "necessarily implicitly divested" by virtue of the status of the Officials as employees of the State. Pet. at 4 & 17; *see Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980) (discussing the necessarily implicitly divested theory). This settled point of law needs no revisiting.

> This Court has found implicit divestiture of inherent sovereignty necessary only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when [1] the tribes seek to engage in foreign relations, [2] alienate their lands to non-Indians without federal consent, or [3] prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights."

South Dakota v. Bourland, 508 U.S. 679, 699 (1993) (Souter, J., dissenting); *see also Duro v. Reina*, 495 U.S. 676 (1990) (criminal jurisdiction over Indians who are members of another tribe); *Rice v. Rehner*, 463 U.S. 713, 726 (1983) (liquor regulation).

In contrast, with respect to the present case's area of tribal court civil jurisdiction, the Court expressly has rejected the necessarily implicitly divested theory. In *National Farmers Union Ins. Cos. v. Crow Tribe*, the Court was urged to extend to civil cases the rule of *Oliphant v.*

Suquamish Indian Tribe, 435 U.S. 191 (1978), that tribal criminal powers over non-Indians have necessarily implicitly divested. The Court refused to do so.

> In *Oliphant* we . . . concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly preempted tribal jurisdiction.
>
> . . . . For several reasons, however, the reasoning of *Oliphant* does not apply to this case.
>
> . . . . [W]e conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require.

471 U.S. at 853-855; *accord Strate v. A-1 Contractors*, 520 U.S. at 449 (tribal court civil jurisdiction over nonmembers is not "categorically restricted.").

As the Court of Appeals correctly recognized, this result is not altered where officials are sued, as in this case, solely in their individual capacities. Pet. App. at A-12 – A-14.[9] The law is clear that "officers sued in their personal capacity come to court as individuals." *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (suits in federal court under 42 U.S.C. § 1983 for violations of federal rights); *Ford*

---

[9] While Hicks originally named the State as a party to his actions in Tribal Court, the Tribal Court has since granted Hicks' motions to dismiss any and all claims against the State and state officials in their official capacities. A party's decision to withdraw a claim renders it moot. *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 512 (1989).

Motor Co. v. Dep't of Treasury, 323 U.S. 459, 462-464 (1945) (suits in federal court under common law claims); *Johnson v. Fankell*, 520 U.S. 911, 914-915 (1997) (suits in state courts under 42 U.S.C. § 1983); *Wood v. Strickland*, 420 U.S. 308, 320-321 (1975) (discussing state court development of qualified and absolute immunity doctrines in suits under common law); *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (while sovereign immunity of tribe bars suit against it, "[w]e have never held that individual agents or officers of a tribe are not liable for damages in actions."). The Court of Appeals carefully limited its decision below to applying this universal rule.[10]

Petitioners concede "that individual-capacity suits against state officials . . . [are] not suit[s] against a state." Pet. at 10. Despite Petitioners' vehement argument to the

---

[10] Petitioners erroneously cast the decision as covering officials sued in their official capacities. Pet. at 7, 12, 16, & 27. Petitioners' error stems from their misunderstanding of 42 U.S.C. § 1983 – which provides remedies for suits against officials in their individual capacities for actions taken under color of state law. In essence, Petitioners ask this Court to re-examine its decision in *Hafer v. Melo*, that "state officers may be held personally liable for damages under § 1983 based upon actions taken in their official capacities." 502 U.S. at 24. As the Court explained there, "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Id.* at 26. This logic applies to suits brought under common law, statutes whose rights are protected by Section 1983, and constitutional provisions. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982) (involving non-Section 1983 actions against officials in their individual capacities "for damages based upon their official acts.").

contrary, Pet. at 6-10, there is thus no issue on the merits of state sovereign immunity from suit in this case. The Eleventh Amendment does not bar "a suit for money damages . . . against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2267-2268 (1999); *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 62-71 (1989) (distinguishing suits under 42 U.S.C. § 1983 against states or officers in their official capacities, which cannot be brought, from suits against officers in their individual capacities, which can); *Kentucky v. Graham*, 473 U.S. 159, 167-168 (1985) ("unless a distinct cause of action is asserted against the [governmental] entity itself, the entity is not even a party to a personal-capacity lawsuit.").

State sovereign immunity from suit is relevant here only to the extent that, because the Officials are officers of the State, they are entitled to assert affirmative defenses such as absolute and qualified immunity. *See Malley v. Briggs*, 475 U.S. 335, 339-340 (1986) (officers sued in individual capacities under 42 U.S.C. § 1983 generally entitled to assert qualified immunity and absolute immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 807-808 (1982) (same for non-Section 1983 individual capacity suits). If they were merely private parties (or, "run-of-the-mill tort feasors," *see* Pet. at 6), these defenses would not be available to them. The Court of Appeals' unequivocal recognition of their availability eliminates the need for review by this Court on the matter.

Finally, Petitioners misleadingly assert that the decision below "diminish[es] state sovereignty." Pet. at 5; 6-9. Regarding the claims remediable by 42 U.S.C. § 1983, this Court already has expressly rejected the argument that state sovereignty is restricted by 42 U.S.C. § 1983, notwithstanding the fact that "imposing personal liability on state officers may hamper their performance of public duties" *Hafer v. Melo*, 502 U.S. at 29-31. To the same effect are the Court's cases involving individual capacity suits under common law. *E.g., Ford Motor Co. v. Dep't of Treasury*, 323 U.S. at 449-450 ("Where relief is sought under general law from wrongful acts of state officials, . . . the citizen is allowed a remedy against the wrongdoer personally.").

Moreover, it is fundamental that unless Congress provides otherwise, which in this case it has not, States have no authority over Indians on an Indian reservation, even to enforce state criminal laws against Indians for alleged crimes occurring off a reservation.

> Arizona's exercise of [its arrest and extradition laws] would clearly interfere with rights essential to the Navajo's self-government . . . This conclusion does not frustrate the State of Arizona in carrying out [state law]. It simply recognizes that Arizona has no authority, and hence no duty, to exercise extradition jurisdiction over Indian residents of the Navajo Reservation.

Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970), *citing Williams v. Lee*, 358 U.S. at 220. The State's own courts have admitted in this case that the State has no independent jurisdiction on the Reservation. Pet. App. at G-1. It thus follows that tribal

jurisdiction over the Officials in their individual capacities is consistent with State sovereignty.

Regarding the federal Indian law jurisdictional question in this case, Petitioners have failed to show that the decision below "expands" or "redefines" tribal jurisdiction in conflict with this Court's cases. They have also failed to cite to any on point cases which are good law in support of their alleged inter-circuit conflict on this issue. There is thus no justification for review by this Court on the issue.

II. ASSUMING *ARGUENDO* THAT THERE IS TRIBAL JURISDICTION, THE PROCEDURAL RULINGS BY THE COURT OF APPEALS REGARDING ADJUDICATION OF THE AFFIRMATIVE DEFENSES ARE CONSISTENT WITH THIS COURT'S DECISIONS IN THE AREAS OF JUDICIAL CIVIL PROCEDURE AND THE TRIBAL EXHAUSTION RULE

Petitioners assert that the Court of Appeals erred when it held that: 1) the merits of the claims of affirmative defenses such as absolute and qualified immunity are non-jurisdictional issues; 2) affirmative defenses are subject to exhaustion in Tribal Court in the first instance; and, 3) these defenses have not yet been exhausted in Tribal Court in this case. Pet. at 12-14 & 18-24. The Court of Appeals, however, correctly understood the nature of the defenses and followed this Court's precedent in deciding these procedural matters in this case.

A. It Is Firmly Established That Affirmative Defenses Are Non-Jurisdictional Issues

Officers sued in their individual capacities may assert absolute or qualified immunity. *Hafer v. Melo*, 502 U.S. at 28-29; *Malley v. Briggs*, 475 U.S. at 339-340; *Harlow v. Fitzgerald*, 457 U.S. at 807-808. But those assertions are not jurisdictional, they are personal affirmative defenses. *Hafer v. Melo*, 502 U.S. at 28; *Harlow v. Fitzgerald*, 457 U.S. at 815 ("Qualified immunity . . . is an affirmative defense that must be pleaded by a defendant official."); *see also Jefferson County v. Acker*, 527 U.S. 423, 119 S.Ct. 2069, 2083 (1999) (Scalia, J., dissenting) (suggesting that it would be "an odd result" to subsume the merits of the defense of qualified immunity within the "threshold jurisdictional question"); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (while qualified immunity is an available defense, it is not relevant to the existence of a cause of action).

Petitioners offer no pertinent authority for overturning this settled law. The cases on which they rely, Pet. at 12-13 & 19-24, were suits against sovereigns or officials in their official capacities and thus involved issues of sovereign immunity from suit. That is not this case. Petitioners' mere desire, Pet. at 12, that "qualified immunity could and should be given a jurisdictional import. . . . " is not worthy of this Court's review.

B. To Ensure Uniformity Of Federal Law, Federal Court Review After Exhaustion In Tribal Court Of The Section 1983 Affirmative Defenses Is Appropriate

"[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Generally, this means before trial and even before certain pre-trial stages. *Mitchell v. Forsyth*, 472 U.S. 511, 527-529 (1985) (immunity defenses should be resolved before trial); *Harlow v. Fitzgerald*, 457 U.S. at 818 (before discovery). In any event, "the trial court . . . must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El v. Britton*, 523 U.S. 574, 597-598 (1998).

The decision below is entirely consistent with this precedent. The Court of Appeals aptly recognized that in this case, the earliest possible adjudication of the merits of the affirmative defenses will occur after final disposition of the jurisdictional issue, assuming that jurisdiction is upheld. While the Tribal Appellate Court instructed the Tribal Court to "set a trial date," Pet. at 18 n.4; Pet. App. at C-5, the Court of Appeals, Pet. App. at A-12 – A-15, undoubtedly meant for the Tribal Court to follow this Court's cases and engage in the affirmative defense adjudication before trial or discovery, to ensure that the Officials are not subjected to "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

To ensure uniformity, the right to federal court review of Tribal Court interpretations of the federal law

affirmative defenses is appropriate once tribal remedies have been exhausted. *See National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. at 856 (indicating that, in addition to federal court review of tribal jurisdictional determinations, federal courts may review the merits of claims in tribal court); *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (such review should be deferential, not a "relitigation" of non-jurisdictional issues "raised . . . and resolved in the Tribal Courts.").[11]

C. The Affirmative Defenses Have Not Been Exhausted In This Case Because The Tribal Court Has Not Yet Ruled on The Merits Of The Defenses

The Court of Appeals properly ruled that the Tribal Court should address the merits of the affirmative

---

[11] To the extent that the affirmative defenses to the non-federal claims are also non-federal in nature, the federal courts should not disturb Tribal Court interpretations of purely tribal law. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. at 16 (1987) ("Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law."); *see also City of Timberlake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (10th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994) ("we defer to the tribal courts' interpretation [of tribal law] even though non-Indians are involved"); *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) (where the highest tribal court has adjudicated an issue of purely tribal law, "[t]hat court's interpretation of tribal law is binding on this court"); *accord Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 630 n.3 (1988) (federal courts should defer to decisions on purely state law made by the highest state court).

defenses in the first instance because it correctly recognized that there has been no such ruling yet. Pet. App. at A-12 – A-15. Petitioners, however, argue that the Tribal Court reached the merits of the issue, and thus the issue has been exhausted and is ripe for federal court review. Pet. at 13 & 18-23. Petitioners' view is incorrect and the Court of Appeals' is correct.[12] The Court of Appeals affirmed the holding of the district court in this case that the Tribal Court has not ruled on the merits of the affirmative defenses. Pet. App. at A-12 – A-13. The district court in this case was especially unswayed by Petitioners' argument on this point that they "raised, argued and briefed [the point] in the tribal court proceedings, [but] the tribal court failed to adequately address these arguments when they were presented, and [thus] erred as a matter of law by denying them immunity." Pet. App. at B-16. "The tribal court did not hold an evidentiary hearing or make definitive findings of fact or conclusions of law on the application of the qualified immunity defense to the facts of this case." *Id.* Thus, the Court of Appeals correctly held that, assuming tribal jurisdiction is upheld, the affirmative defenses remain to be "considered on the merits by the tribal court" in the first instance. Pet. App. at A-13.

---

[12] Petitioners also contest the Court of Appeals' upholding of the district court's ruling that the issue of whether Hicks has properly stated a claim against William Molini, the Director of the Nevada Department of Wildlife, in his individual capacity, has not yet been exhausted in Tribal Court. Pet. at 13; Pet. App. at B-17. However, the Court of Appeals was correct on this issue and thus properly affirmed the remand of this issue to the Tribal Courts. Pet. App. at A-15.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

MELODY L. MCCOY
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Respondents

Supreme Court, U.S.
FILED
NOV 30 2000
CLERK

No. 99-1994

IN THE
Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,
Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

JOINT APPENDIX

FLOYD HICKS
Pro Se
7755 Stillwater Road
Paiute-Shoshone Reservation
Fallon, NV 89406

MELODY MCCOY*
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Respondents Tribal Court and Hon. Joseph Van Walraven

FRANKIE SUE DEL PAPA
Attorney General of the State of Nevada
C. WAYNE HOWLE*
Senior Deputy Attorney General
PAUL G. TAGGART
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1227

Counsel for Petitioners

*Counsel of Record

[Additional Counsel Listed on Inside Cover]

Petition For Certiorari Filed June 6, 2000
Certiorari Granted October 10, 2000

39pp

JEFFREY S. SUTTON
Jones, Day, Reavis & Pogue
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Hicks' Complaint filed 6/22/92 8

Order on appeal, filed 11/10/93 22

Hicks' Amended Complaint, dated 6/01/94 25

Hicks' Notice of Tribal Court Action, filed 10/12/95 30

Order Granting the Petition for a Writ of Certiorari, filed 10/10/00 36

RELEVANT DOCKET ENTRIES

I. FALLON PAIUTE-SHOSHONE TRIBAL COURT: CV-FT-91-034

1.	July 8, 1991	Hicks' Complaint
2.	July 15, 1991	Hicks' First Amended Complaint
3.	July 19, 1991	State's Motion to Quash Service of Process
4.	July 29, 1991	Hicks' Motion Opposing Motion to Quash Service of Process
5.	Aug. 8, 1991	State's Reply to Opposition to Motion to Quash Service of Process
6.	Aug. 16, 1991	Hicks' Reply to State Defendants' Reply to Opposition to Motion to Quash Service of Process
7.	Dec. 31, 1991	Hicks' Second Amended Complaint
8.	Dec. 31, 1991	Hicks' Demand for Jury Trial
9.	Jan. 13, 1992	Hicks' Supplemental Brief and Memorandum of Points and Authorities in Support of Plaintiff's Opposition to State Defendants' Motion to Quash Service of Summons
10.	Jan. 21, 1992	State's Supplemental Points and Authorities in Support of Motion to Quash Service of Process
11.	Jan. 27, 1992	Hicks' Addendum to Plaintiff's Supplemental Brief in Opposition to State Defendants' Motion to Quash Service of Process

12.	Aug. 4, 1992	Hicks' Supplemental Points and Authorities in Opposition to State Defendants' Motion to Quash Service of Process
13.	Nov. 16, 1992	Order that Parties File Supplemental Briefs on Issue of Validity of Service of Process
14.	Nov. 17, 1992	Hicks' Brief in Support of Motion Opposing State Defendants' Motion to Quash Service of Process
15.	Nov. 20, 1992	State's Second Supplement in Support of Motion to Quash Service of Process
16.	Mar. 13, 1993	State's Notice of Appeal
17.	May 5, 1993	Order Quashing Service of Process
18.	Sept. 2, 1993	State's Renewed Motion to Quash Service of Process
19.	Sept. 7, 1993	Hicks' Response to State Defendants' Renewed Motion to Quash
20.	Sept. 8, 1993	Hicks' Supplemental Response to State Defendants' Renewed Motion to Quash Service of Process
21.	Sept. 20, 1993	State's Reply to Opposition to Motion to Quash
22.	Sept. 21, 1993	Hicks' Response to State Defendants' Reply to Opposition to Motion to Quash
23.	Nov. 29, 1993	Hicks' Notice of Appeal, CV-FT-91-034 and CV-FT-92-031
24.	Feb. 2, 1994	Order Quashing Service of Process

25.	June 1, 1994	Hicks' [Third] Amended Complaint
II.	FALLON PAIUTE-SHOSHONE TRIBAL COURT: CV-FT-92-031	
1.	June 22, 1992	Hicks' Complaint
2.	July 17, 1992	State's Motion to Quash Service of Process
3.	July 27, 1992	Hicks' Motion Opposing State Defendants' Motion to Quash Service of Process
4.	Aug. 5, 1992	Hicks' Supplemental Points and Authorities in Opposition to State Defendants' Motion to Quash Service of Process
5.	Aug. 11, 1992	State's Reply to Supplemental Points and Authorities in Opposition to State Defendants' Motion to Quash
6.	May 5, 1993	Order Quashing Service of Process
7.	Aug. 26, 1993	State's Renewed Motion to Quash Service of Process
8.	Sept. 7, 1993	Hicks' Opposition to State's Renewed Motion to Quash
9.	Sept. 14, 1993	State's Reply to Opposition to Motion to Quash
10.	Sept. 20, 1993	Hicks' Response to State Defendants' Reply to Opposition to Motion to Quash
11.	Nov. 29, 1993	Hicks' Notice of Appeal, CV-FT-91-034 and CV-FT-92-031
12.	Feb. 2, 1994	Order Quashing Service of Process

13.	June 1, 1994	Hicks' Amended Complaint

III. INTER-TRIBAL APPELLATE COURT

1.	Nov. 10, 1993	Order, CV-FT-91-034 and CV-FT-92-031
2.	May 13, 1994	Order, CV-FT-91-034 and CV-FT-92-031

IV. FEDERAL DISTRICT COURT: CV-94-00351-DWH

1.	May 31, 1994	State's Complaint
2.	July 11, 1994	Answer on Behalf of Tribal Court, Fallon Paiute-Shoshone Tribes & Hon. Joseph Van Walraven
3.	July 12, 1994	Answer on Behalf of Floyd Hicks
4.	Aug. 9, 1994	Notice/Record on Review on Behalf of State Plaintiffs
5.	Jan. 13, 1995	Motion for Summary Judgment on Behalf of State Plaintiffs
6.	Jan. 12, 1995	Motion for Summary Judgment on Behalf of Tribal Defendants
7.	Jan. 13, 1995	Motion for Summary Judgment on Behalf of Floyd Hicks
8.	Feb. 11, 1995	Opposition to Plaintiff's Summary Judgment Motion, on Behalf of Tribal Defendants
9.	Feb. 13, 1995	Opposition to Defendants' Motions for Summary Judgment, on Behalf of State Plaintiffs
10.	Feb. 15, 1995	Joinder in Tribal Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, on Behalf of

		Floyd Hicks
11.	Feb. 28, 1995	Reply in Support of Motion for Summary Judgment, on Behalf of State Plaintiffs
12.	Feb. 27, 1995	Reply in Support of Motion for Summary Judgment, on Behalf of Tribal Defendants
13.	Mar. 29, 1996	Order denying without prejudice parties' motions for summary judgment, and allowing thirty days within which to file supplemental briefs to renew their summary judgment motions
14.	April 30, 1996	Tribal Defendants' Supplemental Memo
15.	May 1, 1996	State's Supplemental Memo
16.	May 1, 1996	Hicks' Supplemental Memo
17.	May 8, 1996	State's Response
18.	May 10, 1996	Tribal Defendants' Reply
19.	Oct. 1, 1996	Memorandum, Decision and Order
20.	Oct. 1, 1996	Judgment
21.	Oct. 28, 1996	Notice of Appeal
22.	Mar. 31, 2000	Order Spreading Mandate
23.	May 16, 2000	Order vacating order Spreading Mandate

V. NINTH CIRCUIT COURT OF APPEAL: 96-17315

1.	Dec. 20, 1996	Docketed cause and entered appearances of counsel
2.	Dec. 20, 1996	Appellants' Civil Appeals Docketing Statement
3.	Dec. 20, 1996	Appellants' Statement of Issues on Appeal
4.	Feb, 19, 1997	Appellants' Opening Brief
5.	Mar. 31, 1997	Tribal Appellees' Brief
6.	Apr. 2, 1997	Appellee Floyd Hicks' Brief
7.	Apr. 17, 1997	Appellants' Reply Brief
8.	July 1, 1997	Tribal Appellees' Supplemental Brief
9.	July 2, 1997	Appellants' Supplemental Brief
10.	July 3, 1997	Appellee Floyd Hicks' Supplemental Brief
11.	Oct. 7, 1997	Argued and submitted
12.	Oct. 10, 1997	Order (In light of similar issues pending before the court, this appeal is withdrawn from submission until further order of the court.)
13.	Mar. 4, 1999	Order (The court withdrew this appeal from submission on 10/7/97 pending resolution of similar issues pending before the court. We continue to withhold this appeal from submission pending resolution of El Paso Nat. Gas Co. v.

		Neztsosie, 136 F.3d 610 (9th Cir.), cert. Granted, 119 S. Ct. 334 (1998).)
14.	Nov. 4, 1999	Order resubmitting this appeal
15.	Nov. 9, 1999	Opinion: Affirmed. Judgment entered.
16.	Nov. 22, 1999	Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc
17.	Dec. 17, 1999	Order (The appellee is directed to file a Response to the Appellant's Petition for Rehearing En Banc.)
18.	Jan. 7, 2000	Appellee Floyd Hicks' Response Opposing Petition for En Banc Rehearing
19.	Jan. 10, 2000	Tribal Appellees' Response to Appellants' Petition for Rehearing and Suggestion for En Banc Disposition
20.	Jan. 24, 2000	Order and Amended Opinion
21.	Mar. 9, 2000	Order (The Petition for Rehearing is denied and the Petition for Rehearing En Banc is rejected.)
22.	Mar. 16, 2000	Mandate issued
23.	Mar. 29, 2000	Appellants' Motion to Recall the Mandate is granted.

[Filed June 22, 1992]

Law Offices of
Ronald E. Johnny
P.O. Box 13052
Reno, Nevada 89507

IN THE TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES

FLOYD HICKS,

Plaintiff,

vs.

Case No. CV-92-031

COMPLAINT

REBECCA HAROLD, ROBERT WISE, MICHAEL C. SPENCER, CONFIDENTIAL INFORMANT of MICHAEL C. SPENCER, TRIBAL JOHN DOES I-X, in their official Capacity, and REBECCA HAROLD, ROBERT WISE, MICHAEL C. SPENCER, CONFIDENTIAL INFORMANT OF MICHAEL C. SPENCER, TRIBAL JOHN DOES I-X, and STATE JOHN DOES I-X, Individually,

Defendants /

NOW COMES, Plaintiff, FLOYD HICKS, and for cause of action against Defendants, allege as follows:

FIRST CAUSE OF ACTION
(Trespass to Land)

1. The Plaintiff, FLOYD HICKS, is an adult Indian; an enrolled member of the Fallon Paiute-Shoshone Tribes; a citizen of both the State of Nevada and the United States; and, a resident of the Fallon Paiute-Shoshone Indian Reservation.

2. The Defendant, REBECCA HAROLD, is a non-Indian attorney, licensed to practice law in the State of Nevada, is the chief judge of the Fallon Tribal Court, an employee or official of the Fallon Paiute-Shoshone Tribes; the Defendant, ROBERT WISE, is a non-Indian, was, on the dates complained of herein, an employee or official (a Lieutenant of the Fallon Tribal Police Department) of the Fallon Paiute-Shoshone Tribes; the Defendants, TRIBAL JOHN DOES I-X, are officials and/or employees of the Fallon Paiute-Shoshone Tribes; the Defendant, MICHAEL C. SPENCER, is a non-Indian, official or employee (game warden) of the State of Nevada, Department of Wildlife; the Defendant, CONFIDENTIAL INFORMANT of MICHAEL C. SPENCER, may or may not be an Indian and may or may not be a resident of the Fallon Indian Reservation; the Defendants, STATE JOHN DOES I-X, are employees or officials of the State of Nevada.

3. On or about August 30, 1990, the Defendant, MICHAEL C. SPENCER, aka "MIKE SPENCER," executed a three page Affidavit in the matter captioned In The Matter Of The Application For A Search Warrant, Case No. 90-02065 (Justice Court, New River Township, County of Churchill, State of Nevada), witnessed by LENA McQUEEN, Notary Public, State of Nevada. See Affidavit, marked Plaintiff's Exhibit #1.

4. The Affidavit, identified in paragraph #3, above, advises that MIKE SPENCER has been investigating a possible crime of possessing or killing a big horn sheep, a gross misdemeanor, in violation of N.R.S. 501.376, involving FLOYD HICKS, the Plaintiff. See Affidavit, page 1, lines 19-22.

5. The Affidavit, identified in paragraph #3, above, advises that the information supplied by the confidential informant to the Defendant, MIKE SPENCER, was more than two years old. Id, page 1, lines 27-28; page 2, liens 1-2.

6. The Affidavit, identified in paragraph #3, above, demonstrates that the Defendant, MIKE SPENCER, waited an unreasonable time after the observations of his CONFIDENTIAL INFORMANT before seeking the state search warrant. Id, page 1, line 27.

7. On August 30, 1990, Justice of the Peace, MARILYN CRAIG, issued a document titled "Search Warrant," which was not, in fact, a search warrant (see Plaintiff's Exhibit #2), to: "ANY PEACE OFFICER IN THE COUNTY OF CHURCHILL, STATE OF NEVADA." advising:

> "YOU ARE HEREBY COMMANDED, SUBJECT TO OBTAINING APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES, to search the said premises located at 7755 Stillwater Road, Fallon, Churchill County, Nevada, for any big horn sheep heads or evidence of same....
>
> "This Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute-Shoshone Tribes of Fallon, Churchill County, Nevada."

Plaintiff's Exhibit #2 at 1-2.

8. On or about August 30, 1990, the Defendant, REBECCA HAROLD, with malicious intent or bad faith, under color of and in violation of the laws of the Fallon Paiute-Shoshone Tribes (hereinafter "tribal law"), authorized the service of the New River Township document titled "Search Warrant," identified in paragraph #9, above, allowing Tribal Defendant WISE and State Defendant SPENCER to enter the exterior boundaries of, and upon, the Plaintiff's allotted Indian lands and search for big horn sheep heads or other evidence of a violation of a gross misdemeanor under the laws of the State of Nevada.

9. On or about August 30, 1990, under color of and in violation of tribal law, the Tribal Defendants, REBECCA HAROLD, ROBERT WISE and Tribal JOHN DOES I thru X, with malicious intent or bad faith, conspired to and did illegally enter the allotted Indian lands of the Plaintiff, FLOYD HICKS, and committed Trespass and Land against the Plaintiff.

10. On or about August 30, 1990, under color of the laws of the State of Nevada and in violation of tribal law, the State Defendants, MICHAEL C. SPENCER and State JOHN DOES I thru X, conspired to and did illegally enter the allotted Indian lands of the Plaintiff, FLOYD HICKS, and committed Trespass to Land against the Plaintiff.

12. The acts and omissions of the Defendant, REBECCA HAROLD, ROBERT WISE, Tribal JOHN DOE I thru X, MICHAEL C. SPENCER, and State JOHN DOES I thru X, in their official and individual capacity, constitute the tort of Trespass to Land against the Plaintiff, FLOYD HICKS.

SECOND CAUSE OF ACTION
(Trespass to Chattels)

13. Plaintiff realleges and incorporates herein by this reference, each and every allegation contained in Paragraph 1 through 12 of the First Cause of Action of this Complaint.

14. On or about August 30, 1990, the Defendant, REBECCA HAROLD, with malicious intent or bad faith, under color of and in violation of tribal law, authorized the Defendants, ROBERT WISE and MIKE SPENCER, to take from the Plaintiff's allotted Indian lands an aged big horn sheep head.

15. On or about August 30, 1990, the State Defendants, MIKE SPENCER and State JOHN DOES I thru X, under color of state law and in violation of tribal law, conspired to and did take from the Plaintiff's allotted Indian lands an aged big horn sheep head and kept same for approximately

90 days damaging same by detaching, and failing to return, an ear of the big horn sheep head.

16. On or about August 30, 1990, Tribal Defendants, ROBERT WISE and Tribal JOHN DOES I thru X, under color of and in violation of tribal law, with malicious intent or bad faith, conspired to and did take from the Plaintiff's allotted Indian lands an aged big horn sheep head.

17. The acts and omissions of the Defendants, REBECCA HAROLD, ROBERT WISE, Tribal JOHN DOES I thru X, MIKE SPENCER, CONFIDENTIAL INFORMANT of MICHAEL C. SPENCER, and State JOHN DOES I thru X, in their official and individual capacity, constitute the tort of Trespass to Chattels against the Plaintiff, FLOYD HICKS.

THIRD CAUSE OF ACTION
(Abuse of Process)

18. Plaintiff realleges and incorporates herein by this reference, each and every allegation contained in Paragraph 1 through 12 of the First Cause of Action, and Paragraph 13 through 17 of the Second Cause of Action, of this Complaint.

19. Since 1986, the Fallon Paiute-Shoshone Tribes have had a specific, codified, policy and process to allow agents of a state government to "discover property which will substantially aid the requesting government and which is stolen, or illegal to possess or is the instrumentality, evidence, or fruit of a crime," which requires: (1) that an agreement between the state and Fallon Tribes have been executed, (2) that a felony investigation be in process, (3) that a tribal "judge shall issue a Tribal search warrant to be executed and returned as are other Tribal search warrants," and (4) that a hearing be held whereby the person from whom property may have been seized could have due process of law.

20. On or about August 30, 1990, Tribal Defendants, REBECCA HAROLD, ROBERT WISE and Tribal JOHN

DOES I thru X, with malicious intent or bad faith, under color of and in violation of tribal law, conspired to and did abuse the tribal search warrant process as to the Plaintiff, FLOYD HICKS.

21. On or about August 30, 1990, State Defendants, MICHAEL C. SPENCER and State JOHN DOES I thru X, under color of state law and in violation of tribal law, conspired to and did abuse the tribal search warrant process as to the Plaintiff, FLOYD HICKS.

22. The actions and omissions of the Defendants, REBECCA HAROLD, ROBERT WISE, Tribal JOHN DOES I thru X, MICHAEL C. SPENCER, CONFIDENTIAL INFORMATN of MICHAEL C. SPENCER, and State JOHN DOES I thru X, in their official and individual capacity, constitute the tort of abuse of process against the Plaintiff, FLOYD HICKS.

FOURTH CAUSE OF ACTION
(Violation of Civil Rights – Denial of Equal Protection)

23. Plaintiff realleges and incorporates herein by this reference, each and every allegation contained in Paragraph 1 through 12 of the First Cause of Action, Paragraph 13 through 17 of the Second Cause of Action, and Paragraph 18 through 22 of the Third Cause of Action, of this Complaint.

24. The Indian Civil Rights Act of 1968 codified at, title 25, United States Code § 1302, and tribal law, is mandated upon and applicable to the Tribal Defendants, REBECCA HAROLD, ROBERT WISE, and Tribal JOHN DOES I thru X.

25. By their actions, under color of and in violation of tribal law, against the Plaintiff, FLOYD HICKS, and his property on the Fallon Paiute-Shoshone Indian Reservation, with malicious intent or bad faith, the Tribal Defendants have violated the Plaintiff's civil rights of equal protection

as guaranteed by tribal law and the Indian Civil Rights Act of 1968.

26. The 14th Amendment to the United States Constitution is mandated upon and applicable to State Defendants, MICHAEL C. SPENCER and State JOHN DOES I thru X, and requires that states, their officials, and employees afford equal protection of law to the Plaintiff, FLOYD HICKS. See U.S. Const., art. XIV, § 1.

27. The 14th Amendment to the United States Constitution is enforceable in this court through title 42, United States Code, § 1983 and other federal laws.

28. By their actions, under color of state law and in violation of tribal law, against the Plaintiff, FLOYD HICKS, and his property on the Fallon Paiute-Shoshone Indian Reservation, the State Defendants have violated the Plaintiff's civil right of equal protection under the Indian Civil Rights Act of 1968 and the 14th Amendment to the United States Constitution

FIFTH CUASE OF ACTION
(Violation of Civil Rights – Denial of Due Process)

29. Plaintiff realleges and incorporates herein by this reference, each and every allegation contained in Paragraph 1 through 12 of the First Cause of Action, Paragraph 13 through 17 of the Second Cause of Action, and Paragraph 18 through 22 of the Third Cause of Action, and Paragraph 23 through 28 of the Fourth Cause of Action, of this Complaint.

30. The Indian Civil Rights Act of 1968 codified at, title 25, United States Code § 1302, and tribal law, is mandated upon and applicable to the Tribal Defendants, REBECCA HAROLD, ROBERT WISE, and Tribal JOHN DOES I thru X.

31. By their actions, under color of and in violation of tribal law, against the Plaintiff, FLOYD HICKS, and his

property on the Fallon Paiute-Shoshone Indian Reservation, with malicious intent or bad faith, the Tribal Defendants have violated the Plaintiff's civil rights to due process by denying him the seizures hearing guaranteed by tribal law and not meeting the due process mandate of the Indian Civil Rights Act of 1968.

32. The 14th Amendment to the United States Constitution is mandated upon and applicable to State Defendants, MICHAEL C. SPENCER and State JOHN DOES I thru X, and requires that states, their officials, and employees afford due process of law. See U.S. Const., art. XIV, § 1.

33. The 14th Amendment to the United States Constitution is enforceable in this court through title 42, United States Code, § 1983 and other federal laws.

34. By their actions, under color of state law and in violation of tribal law, against the Plaintiff, FLOYD HICKS, and his property on the Fallon Paiute-Shoshone Indian Reservation, the State Defendants have violated the Plaintiff's civil right to due process afforded by the Indian Civil Rights Act of 1968 and the 14th Amendment of the United States Constitution.

SIXTH CAUSE OF ACTION
(Denial of Civil Rights – Unreasonable Search and Seizure)

35. Plaintiff realleges and incorporates herein by this reference, each and every allegation contained in Paragraph 1 through 12 of the First Cause of Action, Paragraph 13 through 17 of the Second Cause of Action, and Paragraph 18 through 22 of the Third Cause of Action, and Paragraph 23 through 28 of the Fourth Cause of Action, Paragraph 29 through 34 of the Fifth Cause of Action, of this Complaint.

36. The Indian Civil Rights Act of 1968 codified at, title 25, United States Code § 1302, and tribal law, is mandated upon and applicable to the Tribal Defendants, REBECCA HAROLD, ROBERT WISE, and Tribal JOHN DOES I thru X.

37. By their actions, under color of and in violation of tribal law, against the Plaintiff, FLOYD HICKS, and his property on the Fallon Paiute-Shoshone Indian Reservation, with malicious intent or bad faith, the Tribal Defendants have denied the Plaintiff's civil right to be protected against unreasonable searches and seizures as guaranteed by tribal law the Indian Civil Rights Act of 1968.

38. The 5th Amendment to the United States Constitution prohibition against unlawful search and seizure is mandated upon and applicable to State Defendants, MICHAEL C. SPENCER and State JOHN DOES I thru X through the 14th Amendment of the United States Constitution.

39. The 5th Amendment to the United States Constitution is enforceable in this court through the 14th Amendment to the United States Constitution, title 42, United States Code, § 1983 and other federal laws.

40. By their actions, under color of state law and in violation of tribal law, against the Plaintiff, FLOYD HICKS, and his property on the Fallon Paiute-Shoshone Indian Reservation, the State Defendants have denied the Plaintiff's civil rights by denying him the protection against unreasonable search and seizure as guaranteed by the Indian Civil Rights Act of 1968 and the 5th and 14th Amendments to the United States Constitution.

SEVENTH CAUSE OF ACTION
(Wrongful Civil Proceedings)

41. Plaintiff realleges and incorporates herein by this reference, each and every allegation contained in Paragraph 1 through 12 of the First Cause of Action, Paragraph 13 through 17 of the Second Cause of Action, and Paragraph 18 through 22 of the Third Cause of Action, and Paragraph 23 through 28 of the Fourth Cause of Action, Paragraph 29 through 34 of the Fifth Cause of Action, Paragraph 35 through 40 of the Sixth Cause of Action, of this Complaint.

42. The Defendants, REBECCA HAROLD, ROBERT WISE, and Tribal JOHN DOES I thru X, with malicious intent or bad faith, either initiated or participated in a quasi-civil process which caused an interference with the property of the Plaintiff, FLOYD HICKS, and cause him to expend time, energy, and money in preventing the search of his premises under an invalid warrant.

43. The Defendants, MICHAEL C. SPENCER, CONFIDENTIAL INFORMANT of MICHAEL C. SPENCER, and State JOHN DOES I thru X, either initiated or participated in a quasi-civil process which caused an interference with the property of the Plaintiff, FLOYD HICKS, and cause him to expend time, energy, and money in preventing the search of his premises under an invalid warrant.

44. The property seized by order of the Defendant, REBECCA HAROLD, and seized by the Defendants, ROBERT WISE, Tribal JOHN DOES I thru X, MICHAEL C. SPENCER, CONFIDENTIAL INFORMANT of MICHAEL C. SPENCER, and State JOHN DOES I thru X, proved to be an aged big horn sheep head and not the freshly killed big horn sheep head reported by the CONFIDENTIAL INFORMANT of MICHAEL C. SPENCER.

45. The actions of the Defendants, REBECCA HAROLD, ROBERT WISE, Tribal JOHN DOES I thru X, MICHAEL C. SPENCER, CONFIDENTIAL INFORMANT of MICHAEL C. SPENCER, and State JOHN DOES I thru X, in their official and individual capacity, constitute the tort of wrongful civil proceedings against the Plaintiff, FLOYD HICKS.

EIGHTH CAUSE OF ACTION
(Writ of Injunction for Declaratory Relief)

46. Plaintiff realleges and incorporates herein by this reference, each and every allegation contained in Paragraph

1 through 12 of the First Cause of Action, Paragraph 13 through 17 of the Second Cause of Action, and Paragraph 18 through 22 of the Third Cause of Action, and Paragraph 23 through 28 of the Fourth Cause of Action, Paragraph 29 through 34 of the Fifth Cause of Action, Paragraph 35 through 40 of the Sixth Cause of Action, Paragraph 41 through 45 of the Seventh Cause of Action, of this Complaint.

47. Tribal law waives tribal immunity and tribal official and employee immunity for writs in the nature of injunction for declaratory relief for review and enforcement or compliance with the Fallon Tribes' procedures. See Title 1, Fallon Tribes Law & Order Code, § 1-10-030.

48. The actions of the Tribal Defendants, REBECCA HAROLD, ROBERT WISE, and Tribal JOHN DOES I through X, violate the Fallon Tribes' procedures as to the issuance of tribal search warrants, the handling of evidence and other property sought by a state governmental agency, the mandated seizure hearing, etc. See generally, Title 4, Fallon Tribes Law & Order Code.

49. The court should issue a writ of injunction for declaratory relief advising that the order of the Honorable REBECCA HAROLD, authorizing service of the document prepared by Justice of the Peace MARILYN CRAIG, and the actions of the other Tribal-Defendants, ROBERT WISE and Tribal JOHN DOES I thru X, are illegal because they violate tribal law and the Indian Civil Rights Act of 1968.

NINTH CAUSE OF ACTION
(Writ of Injunction for Equitable Relief)

50. Plaintiff realleges and incorporates herein by this reference, each and every allegation contained in Paragraph 1 through 12 of the First Cause of Action, Paragraph 13 through 17 of the Second Cause of Action, and Paragraph 18 through 22 of the Third Cause of Action, and Paragraph 23 through 28 of the Fourth Cause of Action, Paragraph 29

through 34 of the Fifth Cause of Action, Paragraph 35 through 40 of the Sixth Cause of Action, Paragraph 41 through 45 of the Seventh Cause of Action, Paragraph 46 through 49 of the Eight Cause of Action, of this Complaint.

51. Tribal law waives tribal immunity and tribal official and employee immunity for writs in the nature of injunction for declaratory relief for review and enforcement or compliance with the Fallon Tribes' procedures. See Title 1, Fallon Tribes Law & Order code, § 1-10-030.

52. The actions of the Tribal Defendants, REBECCA HAROLD, ROBERT WISE, and Tribal JOHN DOES I thru X, violate the Fallon Tribes' procedures as to the issuance of tribal search warrants, the handling of evidence and other property sought by a state governmental agency, the mandated hearings, etc. See generally, Title 4, Fallon Tribes Law & Order Code.

53. The actions of the Tribal Defendants, REBECCA HAROLD, ROBERT WISE, and Tribal JOHN DOES I thru X, violate the procedural dictates of the Indian Civil Rights Act before a search may be authorized by tribal officials and employees. See U.S.C. § 1302.

54. The court should issue a writ of injunction for equitable relief advising that the order of the Honorable REBECCA HAROLD, authorizing service of the document prepared by Justice of the Peace MARILYN CRAIG on the Fallon Indian reservation, and the actions of the other Tribal Defendants, ROBERT WISE and Tribal JOHN DOES I thru X, are illegal because they violate tribal law and the Indian Civil Rights Act of 1968.

WHEREFORE THE PLAINTIFF prays the court:

Award the Plaintiff, FLOYD HICKS:

a. $500.00 in damages for Trespass to Land against each Defendant;

b. $1000.00 in damages for Trespass to Chattels against each Defendant;

c. $1500.00 in damages for Abuse of Process against each Defendant;

d. $700.00 in damages for denying Equal Protection against each Defendant;

e. $700.00 in damages for denying Due Process against each Defendant;

f. $700.00 in damages for unreasonable search and seizure against each Defendant;

g. $700.00 in damages for wrongful civil proceedings against each Defendant;

55. Issue the Writ of Injunction for Declaratory Relief as set forth above

56. Issue the Writ of Injunction for Equitable Relief as set forth above.

57. Grant any other relief or damages which the Plaintiff is entitled.

Respectfully submitted,
Law Office of
RONALD E. JOHNNY
/s/ Ronald E. Johnny

RONALD E. JOHNNY
Legal Counsel for Plaintiff
P. O. Box 13052
Reno, Nevada 89507

CERTIFICATION

I, FLOYD HICKS, hereby state and affirm, subject to the laws of the Fallon Paiute-Shoshone Tribes, including the tribal law against perjury, that I have read the above

Complaint and that it is true to the best of my knowledge, belief and information.

/s/ Floyd Hicks
FLOYD HICKS

Witnessed by:
/s/ unreadable
COURT CLERK

[Filed Nov. 10, 1993]

IN THE INTERTRIBAL COURT OF APPEALS OF NEVADA
98 COLONY ROAD, RENO, NEVADA 89502

FLOYD HICKS

Plaintiff/Appellee,

vs.

ORDER

Cases CV 91-034
CV 92-031

STATE OF NEVADA, WILLIAM MOLINI, MICHAEL C. SPENCER, RICH ELLINGTON, AND BILL FITZMORRIS, individually and in their official capacity,

Defendant/Appellants./

BEFORE: BEYER, VAN WINKLE AND MCDADE

This case is before this Court following an Appeal from an Order issued by Fallon's Tribal Judge, Joseph J. Van Walraven. Judge Van Walraven issued an Order Quashing Service of Process as to Specially Appearing Defendant's on May 15, 1993. In that Order Judge Van Walraven ruled:

1. "That the doctrine of sovereign or qualified immunity does not prevent the Fallon Tribal Court from exerting personal jurisdiction over the State Defendant's; and

2. That the Court is without jurisdiction over the persons of the State Defendant's for the reason that the Business Council of the Fallon Paiute Shoshone Tribes has enacted no procedure for service outside of its territorial jurisdiction by Certified Mail."

We believe that the basis for Judge Van Walraven's ruling is undoubtedly predicated on Title 1, chapter 30,

section 40 of the Fallon Law and Order Code which reads as follows:

> "The Nevada Rules of Civil Procedure and the general Civil Laws of the State of Nevada shall be used as a guide in cases in the Tribal Court involving claims between parties but not so as to impede the administration of justice nor contravene the application of any Tribal law or custom or federal law nor to produce any absurd result nor impose any regulatory scheme or policy not contemplated by the Tribe nor to interfere with the Tribes' laws or policies on any subject regulated by the Tribes."

In review of the Nevada Rules of Civil Procedure, Rules 1 thru 5, we note that there is no provision for Service by Certified Mail. Even to the extent that Judge Van Walraven felt compelled to utilize the provisions of NRS as a guide, clearly there was no authority for the type of service utilized by the Plaintiff/Appellee.

We note also that Judge Van Walraven issued an Order on May 3rd, 1993 applying the Nevada Rules of Civil Procedure as of that date "for the remainder of this case". Most assuredly the parties were put on notice as to the Court's intent given the provisions of 1-30-40 of Fallon's Tribal Law and Order Code.

As such, we affirm Judge Van Walraven's Order Quashing Service.

DATED this 10th day of November, 1993.

JUDGES:

/s/_____
Judge, Tom M. Beyer

/s/_____
Judge, Van Winkle

/s/_____
Judge, Clarence McDade

C. Wayne Howle, Esq.
Deputy Attorney General
208 North Fall Street
Capitol Complex
Carson City, NV 89710

Richard E. Olson, Jr.
Claassen & Olson
P. O. Box 2101
Carson City, NV 89702

[Filed June 1, 1994]

Ronald E. Johnny
P. O. Box 13052
Reno, NV 89507-3052
Law Offices
RONALD E. JOHNNY
Ronald E. Johnny
P.O. Box 13052
Reno, Nevada 89507-3052

Tel. (702) 574-0131 (Home-Voice Mail)
(702) 784-1736 (Work)
(702) 741-1736 (Cellular)

FOR PLAINTIFF, FLOYD HICKS

IN THE TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES

FLOYD HICKS,

Plaintiff,

vs.

REBECCA HAROLD, ROBERT WISE, TRIBAL JOHN DOES I-X, STATE OF NEVADA, MICHAEL C. SPENCER, CONFIDENTIAL INFORMANT OF MICHAEL C. SPENCER, STATE JOHN DOES I-X, IN THEIR OFFICIAL CAPACITY, AND REBECCA HAROLD, ROBERT WISE, TRIBAL JOHN DOES I-X, MICHAEL C. SPENCER, CONFIDENTIAL INFORMANT OF MICHAEL C. SPENCER, STATE JOHN DOES I-X, INDIVIDUALLY,

Defendants. /

Case No. CV-FT-92-031

AMENDED COMPLAINT

NOW COMES the Plaintiff, Floyd Hicks, through leagl counsel, Ronald E. Johny, for causes of action against Defendants, alleges as follows:

FIRST CAUSE OF ACTION
(Trespass to Land)

1. The plaintiff, Floyd Hicks, is an adult Native American; an enrolled member of the Fallon Paiute-Shoshone Tribes; a citizen of both the state of Nevada and the United States; and, a resident of the Fallon Paiute-Shoshone Indian Reservation.

2. The defendant, Rebecca Harold, is a non-Indian, Nevada state-licensed attorney, is the chief judge of the Fallon Tribal Court, and employee or official of the Fallon Paiute-Shoshone Tribes; the defendant, Robert Wise, is a non-Indian, was, on the dates complained of herein, an employee or official (a Lieutenant of the Fallon Tribal Police Department) of the Fallon Paiute-Shoshone Tribes; the defendants, Tribal John Does I-X, are officials and/or employees of the Fallon Paiute-Shoshone Tribes who assisted in or otherwise made the decision complained of herein; the defendant, state of Nevada, is a governmental entity; the defendant, Michael C. Spencer, is a non-Indian, official or employee (game warden) of the state of Nevada, Department of Wildlife; the defendant Confidential Informant of Michael C. Spencer, may or may not be a Native American and enrolled member of the Fallon Paiute-Shoshone Tribes; the defendants, State John Does I-X, are officials or employees of the state of Nevada who assisted in or otherwise made the decision complained of herein.

3. All defendants are being sued in their individual and official capacities.

4. On or about August 30, 1990, the defendant, Michael C. Spencer, also known as "Mike Spencer," executed a three page Affidavit in the matter captioned In The Matter Of The Application For A Search Warrant, Case No. 90-02065

(Justice Court, New River Township, County of Churchill, State of Nevada), witness by Lena McQueen, Notary Public, State of Nevada.

5. The Affidavit, identified-above, advises that Mike Spencer is investigating a possible crime, the possessing of killing of a big horn sheep of the California subspecies, a gross misdemeanor, in violation of N.R.S. 501.376, involving the plaintiff, Floyd Hicks.

6. The Affidavit, identified-above, advises that the information supplied by defendant, Confidential Informant of Michael C. Spencer, is more than two-years old.

7. On August 30, 1990, Justice of the Peace, Marilyn Craig, issued a document titled "Search Warrant," which advised any police officer in the County of Churchill, State of Nevada, that the Justice Court lacked jurisdiction to issue a search warrant against the plaintiff, Floyd Hicks.

8. On August 30, 1990, Justice of the Peace, Marilyn Craig, issued a document titled "Search Warrant," which was not a search warrant.

9. On or about August 30, 1990, the defendant, Michael C. Spencer, and the state of Nevada, sought legal counsel from the Churchill County District Attorney with regard to his authority to search and seize items of evidence on the Fallon Indian Reservation.

10. On or about August 30, 1990, the defendant, Rebecca Harold, without lawful authority, against specific tribal laws, and under color of law, authorized the defendant, Michael C. Spencer, and state of Nevada, to enter the allotted Indian lands of the plaintiff, Floyd Hicks, and to search and seize the plaintiff's personal property.

11. On or about August 30, 1990, the defendant, Michael C. Spencer, and state of Nevada, without lawful authority or permission of the plaintiff, Floyd Hicks, and under color of law, entered the allotted Indian land of the plaintiff.

SECOND CAUSE OF ACTION
(Trespass to Chattels)

12. The plaintiff incorporates paragraphs number 1 through 11 here.

13. On or about August 30, 1990, the defendant, Michael C. Spencer, and state of Nevada, without lawful authority, and under color of law, searched the allotted Indian lands of the plaintiff, Floyd Hicks.

14. On or about August 30, 1990, the defendant, Michael C. Spencer, and state of Nevada, while on the plaintiff's allotted Indian lands, without lawful authority, seized, under color of law, the personal property of the plaintiff, to-wit: a 45 year old, mounted, head of a big horn sheep of the Rocky Mountain subspecies.

15. The plaintiff's 45 year old, mounted, head of a big horn sheep of the Rocky Mountain subspecies, was of great personal value to the plaintiff and had great financial value.

16. On or about August 30, 1990, the defendant, Michael C. Spencer, and state of Nevada, without lawful authority, and under color of law, removed the personal property of the plaintiff, to-wit: a 45 year old, mounted, head of a big horn sheep of the Rocky Mountain subspecies, from the allotted Indian lands of the plaintiff and the Fallon Indian Reservation.

THIRD CAUSE OF ACTION
(Violation of Civil Rights Under Federal Law)

17. The plaintiff incorporates paragraphs number 1 through 16 here.

18. The defendant, Michael C. Spencer, and the state of Nevada, violated the plaintiff's civil rights under federal law.

FOURTH CAUSE OF ACTION
(Violation of Civil Rights Under Tribal Law)

19. The plaintiff incorporates paragraphs number 1 through 18 here.

20. The defendant, Michael C. Spencer, and the state of Nevada, violated the plaintiff's civil rights under tribal custom, tradition and common law which is reflected also in the Law & Order Code of the Fallon Paiute-Shoshone Tribes (1986).

WHEREFORE THE PLAINTIFF PRAYS THE COURT:

1. For the First Cause Of Action, Trespass to Land, award the plaintiff $25,000.

2. For the Second Cause of Action, Trespass to Chattels, award the plaintiff $25,000.

3. For the Third Cause Of Action, Denial of Civil Rights Under Federal Law, award the plaintiff $250,000.

4. For the Fourth Cause Of Action, Denial of Civil Rights Under Tribal Law, award the plaintiff $250,000.

5. For any additional relief to which the plaintiff may be entitled, award the plaintiff a reasonable sum.

6. Pay the plaintiff's attorneys fees and costs of suit.

Respectfully submitted June 1, 1994.
Law Offices
RONALD E. JOHNNY
/s/_____
Ronald E. Johnny

[Filed Oct. 12, 1995]

N. Patrick Flanagan, III
Nevada Bar No. 00952
BECKLEY, SINGLETON,
JEMISON & LIST, Chtd.
100 West Liberty Street, Suite 700
Reno, Nevada 89501
(702) 323-8866

Attorneys for Defendant
FLOYD HICKS

UNITED STATES DISTRICT COURT
DISTRICT OF NEVDA

STATE OF NEVADA, WILLIAM WILLIAM MOLINI, Administrator for NEVADA DIVISION OF WILDLIFE and MICHAEL C. SPENCER, RICH ELLINGTON, and BILL FITZMORRIS, as Nevada State Wildlife Wardens and individually,	CASE NO. CV-N-94-351-DWH NOTICE OF TRIBAL COURT ACTION

Plaintiffs,

v.

FLOYD HICKS, TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES, HONORABLE JOSEPH VAN WALRAVEN,

Defendants. /

COMES NOW FLOYD HICKS, defendant, by and through his counsel of record, N. Patrick Flanagan, III of Beckley, Singleton, Jemison & List, and hereby gives notice that the Tribal Court for the Fallon Paiute-Shoshone Tribe has granted Floyd Hick's unopposed Motion to Lift the Stay Order and granted Floyd Hick's Motion to Dismiss the State

of Nevada and all state defendants named in their official capacity.

This notice is given pursuant to Order of this Court and based upon the exhibits appended hereto.

DATED this 12th day of October, 1995.

BECKLEY, SINGLETON, JEMISON & LIST

/s/

N. PATRICK FLANAGAN
100 West Liberty, Suite 700
Reno, Nevada 89501
ATTORNEYS FOR DEFENDANT
FLOYD HICKS

EXHIBIT A

IN THE TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES

FLOYD HICKS, Case No. CV-FT-92-031

Plaintiff,

vs.

REBECCA HAROLD; ROBERT WISE; MICHAEL C. SPENCER; CONFIDENTIAL INFORMATN OF MICHAEL C. SPENCER; TRIBAL JOHN DOES i-X; in their official capacity; and REBECCA HAROLD, ROBERT WISE, MICHAEL C. SPENCER; CONFIDENTIAL INFORMANT OF MICHAEL C. SPENCER, TRIBAL JOHN DOES I-X and State JOHN DOES I-X, individually,

Defendants. /

ORDER GRANTING PLAINTIFF'S MOTION TO LIFT STAY ORDER IN T HIS CASE AND GRANTING PLAINTIFF'S MOTION TO DROP ALL STATE DEFENDANTS NAMED IN THEIR OFFICIAL CAPACITIES

Plaintiff Floyd Hicks has moved this Court for an Order lifting or modifying the Stay Order in this case entered on June 16, 1994, such that the Court may consider a Motion by Plaintiff to drop certain named defendants as parties to this action.

After considering the Motions and the Memorandum of Points and Authorities submitted in support thereof, and no

opposition having been made, the Court finds that good cause exists for the granting of these motions.

Accordingly, IT IS HEREBY ORDERED that the Stay Order entered June 16, 1994 in this case is hereby lifted/modified for the purpose of considering Plaintiff's Motion to drop certain named defendants.

IT IS FURTHER ORDERED that Nevada State Game Warden Michael C. Spencer in his official capacity; the Confidential Informant of Game Warden Michael C. Spencer in his or her official capacity; and, State John Does I thru X in their official capacities are hereby dropped as parties defendants to this action.

DATED this 10th day of October, 1995.

/s/ Joseph Van Walraven
FALLON TRIBAL COURT JUDGE

EXHIBIT B

IN THE TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES

FLOYD HICKS, Case No. CV-FT-91-034

Plaintiff,

vs.

TRIBAL JUDGE REBECCA HAROLD; STATE OF NEVADA; DIRECTOR, NEVADA DEPARTMENT OF WILDLIFE, WILLIAM MOLINI, NEVADA STATE GAME WARDENS MICHAEL C. SPENCER; RICK ELLINGTON, AND BILL FITZMORRIS, AND THEIR CONFIDENTIAL INFORMANT; TRIBAL POLICE OFFICERS BOB WISE AND BOB MINTON; AND JOHN DOES I THRU X, AND REBECCA HAROLD, WILLIAM MOLINI, MICHAEL C. SPENCER, RICK ELLINGTON, BILL FITZMORRIS, CONFIDENTIAL INFORMANT, BOB WISE, BOB MINTON, AND JOHN DOES I THRU X, INDIVIDUALLY,

Defendants. /

ORDER GRANTING PLAINTIFF'S MOTION TO LIFT STAY ORDER IN THIS CASE AND GRANTING PLAINTIFF'S MOTION TO DROP THE STATE OF NEVADA AND ALL STATE DEFENDANTS NAMED IN THEIR OFFICIAL CAPACITIES

Plaintiff Floyd Hicks has moved this Court for an Order lifting or modifying the Stay Order in this case entered on June 16, 1994, such that the Court may consider a Motion

by Plaintiff to drop certain named defendants as parties to this action.

After considering the Motions and the Memorandum of Points and Authorities submitted in support thereof, and no opposition having been made, the Court finds that good cause exists for the granting of these motions.

Accordingly, IT IS HEREBY ORDERED that the Stay Order entered June 16, 1994 in t his case is hereby lifted/modified for the purpose of considering Plaintiff's Motion to drop certain named defendants.

IT IS FURTHER ORDERED that the State of Nevada; William Molini, the Director of the Nevada Department of Wildlife in his official capacity; Nevada State Game Warden Michael C. Spencer in his official capacity; Nevada State Game Warden Rick Ellington in his official capacity; Nevada State Game Warden Bill Fitzmorris in his official capacity; the Game Wardens' Confidential Informant in his or her official capacity; and, State John Does I thru X in their official capacities are hereby dropped as parties defendants to this action.

DATED this 10th day of October, 1995.

/s/ Joseph Van Walraven
FALLON TRIBAL COURT JUDGE

IN THE SUPREME COURT OF THE UNITED STATES

[CAPTION OMITTED IN PRINTING]

Order Granting Petition for a Writ of Certiorari entered on October 10, 2000.

NOV 30 2000 (4)

Supreme Court, U.S.
FILED
NOV 30 2000

No. 99-1994

IN THE
Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,
Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

FRANKIE SUE DEL PAPA
Attorney General of the State of Nevada
C. WAYNE HOWLE
(*Counsel of Record*)
Senior Deputy Attorney General
PAUL G. TAGGART
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1227

Of Counsel:
JEFFREY S. SUTTON
Jones, Day, Reavis & Pogue
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

57 pp

QUESTIONS PRESENTED

(1) Does the sovereign immunity of the State of Nevada, or the state-law immunity of its officers, bar tribal court jurisdiction in actions alleging tribal-law claims and claims based on 42 U.S.C. § 1983 against individually-named state officials, for official actions taken in Indian country with express permission of a tribal judge?

(2) Is a decision on the question of tribal court jurisdiction over state officials properly bifurcated, with consideration of the tribal court's jurisdiction separated from, and antecedent to, a decision on the officials' claims of sovereign and qualified immunity?

(3) Does the rule of *Montana v. United States*, 450 U.S. 544 (1981), creating a presumption against tribal court jurisdiction over non-members, apply to these lawsuits, and if so does it permit them?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS . . 1

STATEMENT 1

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. THE SOVEREIGN IMMUNITY OF THE STATE OF NEVADA BARS TRIBAL COURT JURISDICTION OVER INDIVIDUALLY NAMED STATE OFFICIALS FOR OFFICIAL ACTIONS TAKEN IN INDIAN COUNTRY 9

A. Nevada's Immunity From Suit Precludes Tribal Claim Against State Officials In Tribal Court 10

1. The Terms Of The Constitution And The Framer's Understanding Do Not Support The Tribal Law Claims 10

TABLE OF CONTENTS (con't)

2. History And The Dual-Sovereign Structure Of The Constitution Do Not Support Tribal-Law Claims Against State Officials 13

3. Tribal Court Jurisdiction Over State Officials Is Inconsistent With Limited Tribal Sovereignty 16

4. State Immunity Protects Individually Named State Officials Sued In Tribal Court 20

5. Tribal Law Does Not Unambiguously Abrogate State Immunity From Suit 22

B. The § 1983 Claim Must Be Dismissed 24

1. A Congressional Waiver Of States' Immunity In Tribal Courts Under Federal Law Must Be Unambiguously Expressed 24

2. Section 1983 Does Not Create A Cause Of Action Against State Officials Enforceable In Tribal Courts 25

3. Congress Lacks Authority To Create Any Such Cause Of Action 27

TABLE OF CONTENTS (con't)

II. STATE OFFICIALS' CLAIMS OF SOVEREIGN AND QUALIFIED IMMUNITY SHOULD BE DECIDED TOGETHER WITH THE QUESTION OF TRIBAL COURT JURISDICTION 29

A. Immunity Must Be Considered Along With The Jurisdictional Determination 31

1. This Court's Decisions Consider Immunity As Part Of The Jurisdictional Inquiry 31

2. Tribal Immunity Is Treated As Part Of The Jurisdictional Inquiry 32

B. The Tribal Court Exhaustion Rule Is Prudential, And Policies Underlying It Do Not Support The Independent Exhaustion Of Immunity 33

III. NEITHER *MONTANA* EXCEPTION TO THE PRESUMPTION AGAINST TRIBAL JURISDICTION OVER NONMEMBERS SUPPORTS THE NINTH CIRCUIT'S DECISION 36

A. Under *Montana*, The Tribe Lacks Jurisdiction Over These State Officials In This Case 36

1. The Main Rule Of Presumption Against Tribal Jurisdiction Applies Here 36

2. *Montana*'s First Exception Does Not Apply 36

TABLE OF CONTENTS (con't)

3. *Montana*'s Second Exception Does Not Apply 38

B. *Montana*'s Rule Applies To All Nonmember Cases Without Reference To Land Status 39

1. Precedent Supports *Montana*'s Broad Reading 39

2. Subsequent Decisions Have Not Limited The *Montana* Presumption 41

3. The *Montana* Rule Protects Inherent, Retained Tribal Powers, Including The Right To Exclude 42

4. Tribal Adjudicatory Jurisdiction Should Not Depend Upon Land Status In Indian Country 43

C. *Montana* Should Apply In This Case Because The Tribe Approved The State Actions 43

CONCLUSION 44

TABLE OF AUTHORITIES

Page

Cases

Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*
Anderson v. Creighton, 483 U.S. 635 (1987) 5
Arizona Public Service Co. v. Aspaas, 69 F.3d 1026 (9th Cir. 1995) 33
Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 24
In re Ayers, 123 U.S. 443 (1887) 31
Benz v. Compania Naviera Hidelgo, 353 U.S. 138 (1957) 22
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 29
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) ..... *passim*
Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) 40, 44
Calderon v. Ashmus, 523 U.S. 740 (1998) 32
Cameron v. Bay Mills Indian Community, 845 F. Supp 334 (W.D. Mich. 1994) 33
Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 17
Choctaw Nation v. United States, 119 U.S. 1 (1886) ... 19
Claflin v. Houseman, 93 U.S. 130 (1876) 15
College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) . 32, 38
Conn v. Gabbert, 526 U.S. 286 (1999) 35
County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 11
County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992) 40
Dellmuth v. Muth, 491 U.S. 223 (1989) 25
Duro v. Reina, 495 U.S. 676 (1990) 14, 26, 40
Edelman v. Jordan, 415 U.S. 651 (1974) 21
El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 41

TABLE OF AUTHORITIES (cont.'d)

Page

Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) 17
Fisher v. District Court, 424 U.S. 382 (1976) 19
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 39
Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) 24
Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945) 22
Gregory v. Ashcroft, 501 U.S. 452 (1991) 15, 22
Hafer v. Melo, 502 U.S. 21 (1991) 5, 29
Hans v. Louisiana, 134 U.S. 1 (1890) 10, 14
Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985) 33
Hodel v. Irving, 481 U.S. 704 (1987) 43
Hunter v. Bryant, 502 U.S. 224 (1991) 35
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 32
Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269 (9th Cir. 1991) 33
Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) . 14, 34
Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) 39
Jones v. Meehan, 175 U.S. 1 (1899) 19
Jones v. United States, 120 S.Ct. 1904 (2000) 27
Kennerly v. District Court of Montana, 400 U.S. 423 (1971) 19
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 22, 32
Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) 8, 33
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 21

TABLE OF AUTHORITIES (cont.'d)

Page

McClendon v. United States, 885 F.2d 627 (9th Cir. 1989) 33
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 24
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 19
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 19
Monroe v. Pape, 365 U.S. 167 (1961) 27
Montana v. United States, 450 U.S. 544 (1981) . . . . *passim*
Montana v. Gilham, 932 F. Supp. 1215 (D. Mont. 1996), *aff'd*, 127 F.3d 897 (9th Cir. 1997) 26
Morris v. Hitchcock, 194 U.S. 384 (1904) 37
National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) 8, 17, 34
Nevada v. Hall, 440 U.S. 410 (1979) 5, 30
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 17, 18
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) . . . . . *passim*
Pan American Company v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989) 33
Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982) 27
Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 7, 20, 21, 28, 31
Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990) 25
Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 11, 12
Printz v. U.S., 521 U.S. 898 (1997) 15

TABLE OF AUTHORITIES (cont.'d)

Page

Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) . 8, 31, 34
Rice v. Rehner, 463 U.S. 713 (1983) 18
Roff v. Burney, 168 U.S. 218 (1897) 18
Richardson v. McKnight, 521 U.S. 399 (1997) 26
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 18, 28
Schooner Exch. v. McFadden, 11 U.S. 116 (1812) 22
Seminole Tribe v. Florida, 517 U.S. 44 (1996) . . . . *passim*
Siegert v. Gilley, 500 U.S. 226 (1991) 35
South Dakota v. Bourland, 508 U.S. 679 (1993) . . . 18, 40
South Dakota v. North Carolina, 192 U.S. 286 (1904) 12
Strate v. A-1 Contractors, 520 U.S. 438 (1997) . . . . *passim*
United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876) 19
United States v. Kagama, 118 U.S. 375 (1886) 16, 18
United States v. Nordic Village, 503 U.S. 30 (1992) . . . 26
United States v. Quiver, 241 U.S. 602 (1916) 19
United States v. Rogers, 45 U.S. (4 How.) 567 (1846) . 17
United States v. Wheeler, 435 U.S. 313 (1978) 17, 39, 40, 41
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 37
Westfall v. Erwin, 484 U.S. 292 (1988) 24
Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 8, 21, 25
Williams v. Lee, 358 U.S. 217 (1959) 19, 37
Wilson v. Layne, 526 U.S. 603 (1999) 35
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 41
Wyatt v. Cole, 504 U.S. 158 (1992) 26

TABLE OF AUTHORITIES (cont.'d)

Page

Constitutional Provisions and Statutes

U.S. Const. art. I, § 2 15
U.S. Const. art. I, § 3 15
U.S. Const. art. I, § 8, cl. 3 14
U.S. Const. art. II, § 1 15
U.S. Const. art. IV, § 3, cl. 1 15
U.S. Const. art. IV, § 4 15
U.S. Const. art. V 15
U.S. Const. art. VII 15
U.S. Const. amend. X 1
U.S. Const. amend. XI 1
U.S. Const. amend. XVII 15
Nev. Const. art. 4, § 22 9
Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 4
28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 25
Act of April 30, 1908, 35 Stat. 85 3
Pub. Law 95-337 (1978) 3
Pub. Law 101-618 (1990) 3
Nev. Rev. Stat. § 41.031(1) 9
Nev. Rev. Stat. § 41.031(3) 10
Nev. Rev. Stat. § 41.0339(2) 9
Nev. Rev. Stat. § 41.035(1) 9

Congressional History

H.R. Rep. No. 474, 23d Cong. (1st Sess. 1834) 14

Miscellaneous

1 W. Blackstone *Commentaries* 9
The Federalist No. 24 (Alexander Hamilton) 14
The Federalist No. 25 (Alexander Hamilton) 14

TABLE OF AUTHORITIES (cont.'d)

Page

Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. Colo. L. Rev. 123 (2000) 15

Nancy Thorington, *Civil and Criminal Jurisdiction Over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 McGeorge L. Rev. 973 (2000) 26

OPINIONS BELOW

The decision of the Fallon Tribal Court is reported at 20 Ind. Law Rept. 6038 (May 5, 1993). The Nevada Intertribal Appellate Court decision is reported at 21 Ind. Law Rept. 6076 (May 13, 1994).

The opinion of the district court is reported at 944 F. Supp. 1455 (D. Nev. 1996). The opinion of the Ninth Circuit is reported at 196 F.3d 1020 (1999).

JURISDICTION

The Court of Appeals entered its judgment on March 9, 2000. Petitioners filed their petition for a writ of certiorari on June 6, 2000. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

STATEMENT

Just one noteworthy circumstance attended the routine work performed in August 1990 by Nevada Game Warden Michael Spencer: his search for evidence of poaching in

violation of state law occurred on an Indian reservation. That fact, however, triggered a ten-year legal odyssey when the subject of his search, a tribal member, sued him in tribal court. It also triggered a remarkable federal court decision authorizing tribal lawsuits against state employees.

The decision of the Ninth Circuit holds, for the first time, that tribal courts may decide civil actions filed against state officials under tribal law and 42 U.S.C. § 1983. To reach this result, the court embraced several novel principles: (1) tribal courts possess virtually plenary authority, on a level with state and federal courts, (2) state sovereignty does not bar tribal jurisdiction and is only an affirmative defense, (3) tribal courts have jurisdiction to enter civil rights judgments, including punitive damages, against state officials, (4) tribal courts have jurisdiction over nonmember defendants (including State officials) whenever acts complained of occur on tribal land, (5) state officials' individual defenses are not jurisdictional in tribal court, and (6) state officials claiming immunity in tribal court must wait until the question of tribal jurisdiction is decided first, before either the tribal court or federal court may address their claims of immunity.

The Ninth Circuit's decision would have been remarkable enough if the defendants in tribal court had been private individuals. But they were state officials carrying out traditional state functions. Yet the court analyzed this matter as if no constitutional questions arise when state officials assert sovereign and individual immunity from a tribal court's jurisdiction, so long as the tribal claimants plead the cases as individual-capacity rather than official-capacity actions. This analysis initially overlooked, then misapprehended, constitutional first principles about the

proper relationship among States, Indian Tribes and the Federal Government.[1]

Factual background.

The pedestrian origin of this case was a decision by Nevada game wardens in 1990 and 1991 to execute a state search warrant, approved by a tribal judge, on the Fallon Paiute-Shoshone Reservation. Located sixty miles east of Reno, the Reservation lies wholly within Nevada. It was established by federal authority under the Act of April 30, 1908, 35 Stat. 85, and subsequent enactments. Pub. L. No. 95-337 (1978); Pub. L. No. 101-618 (1990). No treaties pertain to its existence.

On two occasions, separated by a year's time, Nevada wardens seized different mounted bighorn sheep heads from the reservation residence of tribal member Floyd Hicks. The wardens believed the property to be evidence of off-reservation poaching that violated state law.

Before seizing the heads, warden Michael Spencer swore out search warrants, *see* P. App. at E-1 to E-2 and F-3 to F-4, in a state court, then as a matter of comity obtained approval from Tribal Judge Rebecca Harold to execute the warrants on the reservation. P. App. at F-1 and G-1. Tribal police officers accompanied the wardens when they conducted the search. *See* Complaints in Case No. CV-091-034, P. App. at H-7; and CV-FT-092-031, J. App. at 11. In each case, the wardens seized a mounted bighorn sheep head, which later proved not to be evidence of crime and which in each instance was eventually returned.

---

[1] Record references are made herein as follows: to the Joint Appendix as J. App. at xxx; to the Petitioners' Appendix, contained in the Petition for Certiorari, as P. App. at xxx; otherwise to the Record, by docket number of the district or circuit document, together with page number(s), thus: Dist. R. at XX:xxx, Cir. R. at XX:xxx.

Hicks then sued Spencer in two separate actions and named two other wardens and the administrator of the Nevada Division of Wildlife in one of them. The suits were brought in the same tribal court that had approved the warrants. Hicks thus sued the State of Nevada as well as the officials (hereinafter collectively "the State") and sued the individuals in both their individual and official capacities. Hicks also sued the tribal judge and tribal police officers.[2]

Hicks' original claims sounded in tribal and common law tort and also purported to rely on the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301—1341, which makes most provisions of the Bill of Rights applicable to tribal officials. P. App. at H-1 to H-17, and J. App. at 8-21. He also raised a federal constitutional claim, which the Ninth Circuit presumed was a claim under §1983. 196 F.3d at 1023 n.1. The complaints contained a welter of nonspecific claims: *e.g.* "Spencer . . . did not give [Hicks] a copy of a Search and Seizure Warrant," P. App. at H-3; Spencer did not make out a separate affidavit or written application to the tribal judge, *id.* at H-4; the tribal judge did not approve a search of the Hicks property, *id.* (*compare* tribal court "Order Approving and Authorizing Execution of Search Warrant on Tribal Reservation," P. App. at F-1); a tribal judge may only approve warrants in connection with felonious off-reservation offenses, *id.;* the State did not have a reciprocal agreement with the Tribe, *id.*, H-4 to H-5; violation of due process under ICRA, *id.* at H-6; a hearing should have been held before the search was authorized, *id.*; Spencer did not inform the justice of the peace of Hicks' tribal membership, *id.* at H-14.

Before seeking relief in federal court, Nevada litigated the tribe's jurisdiction for almost three years in tribal court. From the inception, the officials raised the State's and their

---

[2] Hicks' case against the tribal officials was dismissed on a directed verdict in 1993. *See* 20 Ind. L. Rept. 6091 (Fallon Tribal Court 1993).

own individual immunities as bars to the tribal court's jurisdiction. Their first brief in tribal court cited the then-new decision in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (P. App. at J-3 to J-5), for their sovereign immunity argument, and *Anderson v. Creighton*, 483 U.S. 635 (1987), for their individual defense. P. App. at J-5 to J-6. A half year later, the tribal court required briefs on two other decisions: *Nevada v. Hall*, 440 U.S. 410 (1979), pertaining to sovereign immunity, and *Hafer v. Melo*, 502 U.S. 21 (1991), relevant to the question of individual immunity defenses. *See* P. App. at K-1 to K-13.

In 1993, the trial court dismissed the actions for lack of proper service. The State argued, and the tribal judge agreed, that there was no tribal legislative authorization for service of process against defendants located outside the Reservation boundaries. *See* P. App. at L-1 to L-2. In doing so, however, the trial court also expressly held that "it is not prevented by doctrines of sovereign or qualified immunity from lawfully exerting personal jurisdiction over the specially appearing State Defendants in this action." P. App. at L-1. A three-judge appellate panel affirmed the trial judge's decision to dismiss Hicks' actions because of a defect in service. Dist. R. at 25:517-19. In August 1993 Hicks attempted to serve the complaint again. Once again, however, the tribal court dismissed the action for improper service.

Another three-judge appellate panel reversed the dismissal, however. In doing so, it remanded the case "to the Fallon Tribal Court to immediately set a trial date and allow the Plaintiff's civil jury trials to be heard without further delay consistent with this decision." P. App. at C-5. At the same time, it leveled the warning that "State Defendants would do well to recognize that they have not only been sued in their official capacity, but in their individual capacity as well." *Id.*

The State then filed an action in the Federal District Court for the District of Nevada, seeking declaratory and injunctive relief against the Tribal Court, Tribal Judge Joseph Van Walraven, and Floyd Hicks. The State argued, as it had in tribal court, that the status of state officials precluded tribal court jurisdiction over them. The district court denied relief, determining that "the status of the state defendants as state actors [does not] argue persuasively against jurisdiction," P. App. at B-15, and that the prior dismissal of the official-capacity defendants mooted the argument, P. App. at B-4 n.3.

The State appealed to the Ninth Circuit on October 29, 1996. On October 7, 1997, the case was argued and submitted. Three days later, the case was withdrawn from submission for two years. The case languished until it was resubmitted on November 4, 1999, and eventually decided on November 9, 1999.

In affirming the lower court, the Ninth Circuit concluded that "the tribal court has subject matter jurisdiction over the claims brought by Hicks against the state officials." P. App. at A-12. The Circuit also ruled that the immunity questions were not exhausted in tribal court and therefore were not properly before the district court or the appeals court. P. App. at A-3.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in compelling four Nevada officials to defend tribal-law and § 1983 claims in tribal court. Neither the Constitution nor the inherent authority of Indian Tribes empowers tribal courts to act contrary to Nevada's carefully-delimited waivers of immunity for official conduct of state employees. Instead, any relief Hicks claims he was entitled to had to be pursued in state or federal court.

1.a. Indian Tribes lack authority either to abrogate a State's immunity from suit or to alter its officials' state-law

immunity from suit. In contrast to the constitutionally-based sovereignty of the States, Indian Tribes are domestic dependent nations, whose courts (which did not come into existence until the twentieth century) have traditionally existed only to enforce tribal law governing the internal and social relations of tribal members. Neither the text of the Constitution, the plan of the convention, history nor common sense indicates that Tribes may adjudicate causes of action against state officials. Any exercise of judicial power over state officials is inconsistent with the dependent status of Tribes, and accordingly any such power—if it ever existed—was divested by the plan of the convention. Just as *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), rejected the contention that the Tribes' "inherent authority" permitted them to bring claims against States in federal court, it is appropriate to reject here the more anomalous contention that Indian Tribes have inherent authority to decide causes of action against States and state officials in tribal court under tribal law.

Nor may respondents circumvent state immunity by the pleading expedience of naming state officials in their individual rather than official capacity. An individual-capacity lawsuit, like relief under *Ex Parte Young*, is a creature of federal law and of the federal courts. No justification exists for extending these extraordinary doctrines beyond the extraordinary circumstances that gave rise to them—the compelling need for a national forum to vindicate federal rights. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (refusing to apply *Ex Parte Young* to claims filed against state officials in federal court under state law). Neither doctrine applies, and neither doctrine should be extended, to claims filed against state officials in tribal courts.

b. Congress did not authorize § 1983 claims against state officials to tribal court, and at any rate lacked the power to do so. Nothing in the terms of § 1983 or the

history leading up to it contains any indication, least of all an unambiguous one, *see Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), that Congress authorized such actions. Indeed, tribal courts did not even exist when Congress enacted the law. It is implausible that Congress meant to create a cause of action in a court that did not even exist. Nor would Congress have such power, even if it meant to exercise it.

2. The Ninth Circuit also erred in concluding that a State's immunity defense is not jurisdictional, and in failing to ensure that it was addressed at the outset. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). The prudential considerations that normally require exhaustion in tribal court, *see National Farmers Union Ins. Cos.*, 471 U.S. 845 (1985), do not apply to immunity defenses raised by state officials in tribal courts.

3. *Montana v. United States*, 450 U.S. 544 (1981), does not authorize Hicks' claims. That decision creates a presumption against tribal jurisdiction over nonmembers, a presumption that applies with special force to tribal claims against state officials—if indeed it does not categorically prohibit such claims. *See Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). Nor do either of the *Montana* exceptions apply. In executing these search warrants, the Nevada wardens were hardly "enter[ing] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. And by executing the warrants with approval of a tribal judge, and in the company of tribal officers, the state officials did not engage in conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 566.

ARGUMENT

I. THE SOVEREIGN IMMUNITY OF THE STATE OF NEVADA BARS TRIBAL COURT JURISDICTION OVER INDIVIDUALLY NAMED STATE OFFICIALS FOR OFFICIAL ACTIONS TAKEN IN INDIAN COUNTRY.

Under the law of Nevada, as under the law of all sovereigns, the State may not be sued except to the extent and except in the manner that it has waived its immunity from suit. Through its Legislature, Nevada has recognized what the English monarchy did not—that the actions of government officials performing public functions occasionally warrant recompense and that monetary recoveries thus occasionally may be drawn on the public fisc. *Compare* 1 W. Blackstone *Commentaries* (describing the English common law maxim—"the King can do no wrong"); NEV. REV. STAT. 41.031(1) (1999). *See also* NEV. CONST. art 4, § 22 (authorizing legislature to waive immunity). To these ends, Nevada grants carefully delimited waivers of its immunity for claims against the State itself and for claims against State officials performing public functions. NEV. REV. STAT. 41.031(1) (1999). Under this waiver, claims may be brought in Nevada state court for monetary relief up to $50,000 per incident. NEV. REV. STAT. 41.035(1) (1999). When suit is filed against a state employee, Nevada law also requires the State to provide representation through the Attorney General once she "has determined that the act or omission on which the action is based appears to be within the course and scope of public duty or employment and appears to have been performed . . . in good faith." NEV. REV. STAT. 41.0339(2) (1999). The Attorney General has made that determination in this case.

By its terms, however, this waiver of immunity does not extend to Hicks' claims under tribal law and §1983 in tribal court. Nevada expressly preserves its sovereign

immunity. NEV. REV. STAT. 41.031(3) (1999). In the face of this constitutionally-protected assertion of immunity, *see Alden v. Maine*, 527 U.S. 706 (1999), Hicks' tribal court claims must be dismissed and he (a Nevada resident) must obey the same immunity limitations that all Nevada residents must observe unless he can show, first, that the relevant lawmaking body (the Tribe in one instance, the federal government in the other) had the power to abrogate this immunity from suit and, second, that it clearly intended to do so. *See Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996). The Tribe and Hicks cannot fulfill either half of this obligation, and accordingly the claims must be dismissed.

A. Nevada's Immunity From Suit Precludes Tribal Claims Against State Officials In Tribal Court.

This cause is of a piece with the "anomalous and unheard-of proceedings or suits" against States that this Court refused to recognize in *Alden v. Maine*, 527 U.S. at 727 (*quoting Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). The Fallon Tribal Court's assertion of jurisdiction over state officials, in any capacity when stemming from government authorized business, is directly at odds with "history and experience, and the established order of things." *Id.*

In bringing these claims under tribal law, the tribal respondents do not point to a federal statute that purports to authorize them. They thus do not rely upon Article I, § 8, U.S. Constitution, and do not claim that the Federal Government has enacted legislation under the Indian Commerce Clause empowering the Tribes to create these causes of action against state officials carrying out state functions. Instead, they claim "inherent" authority to do so.

1. The Terms Of The Constitution And The Framers' Understanding Do Not Support The Tribal Law Claims.

The text of the Constitution, as an initial matter, offers no refuge for this assertion of authority. The Indian

Commerce Clause represents the only significant mention of tribes in the Constitution. Yet it self-evidently does not create this authority, but rather establishes that "Indian relations [are] the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).

Nor can this assertion of inherent authority to preempt state rules of sovereign immunity be squared with "the founders' understanding." *Alden*, 527 U.S. at 734. In accord with that understanding, "[t]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional amendments." *Id.* at 713. Indeed, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 517 U.S. at 72. Thus, the "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'" *Blatchford v. Native Village of Noatak*, 501 U.S. at 781 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934)).

Grounded in the Tenth and Eleventh Amendments, this immunity applies both in federal and state courts, *see Alden, supra,* and thus extends to actions in tribal courts because the "plan of the convention" nowhere surrendered this immunity. *Blatchford*, 501 U.S. at 782. The Court confirmed this point nearly a decade ago.

In *Blatchford,* in 1991, the Court considered—and rejected—a claim of inherent authority to strip the States' immunity from suit that is akin to the claim raised here. There, an Indian Tribe claimed that the States' "sovereign immunity does not restrict suit by Indian tribes" against

States because the tribes themselves are "sovereigns." 501 U.S. at 780. And there, as here, the Tribe claimed (*id.* at 782) that it was more analogous to a State, which may sue another State, *see South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904), than it was to a foreign sovereign, which may not coerce non-consenting States to defend suits, *Monaco v. Mississippi*, 292 U.S. 313 (1934). In rejecting this argument, the Court reasoned:

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States, *Potawatomi Tribe*, *supra*, at 509, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 501 U.S. at 782.

As *Blatchford* recognizes, waivers of state immunity under the "plan of the convention" have been recognized in just two settings—suits by the United States and suits by sister States. Having refused to extend such waivers of immunity to claims by Indian Tribes in federal court in *Blatchford*, the Court should refuse to recognize the more anomalous claim raised here. Nothing immediately preceding the plan of the convention and nothing accomplished during it suggests that the Constitution silently authorized States to be sued in tribal court.

Nor would tribal authority to abrogate state immunity make constitutional sense. In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), the Court held that Congress lacked authority under the Indian Commerce Clause to

subject non-consenting States to suit by Indian Tribes in federal court. In *Alden v. Maine*, the Court held that Congress lacked authority under the Commerce Clause to subject non-consenting States to suit by individuals in state court. And in *Blatchford*, the Court held that the Constitution does not abrogate the States' immunity from suit by Indian Tribes in federal court. To permit the tribal respondents' claim under these circumstances and at this late date would suddenly delegate to Indian Tribes a power that Congress itself does not have and that the Constitution does not permit. It strains credulity to suggest that the States would have ratified a Constitution that permitted tribal claimants to bring claims under tribal law in tribal court that they could not bring under federal law in federal court.

2. History And The Dual-Sovereign Structure Of The Constitution Do Not Support Tribal-Law Claims Against State Officials.

Not only does the text of the Constitution "specifically recognize the States as sovereign entities," *Seminole Tribe*, 517 U.S. at 71 n.15., and not only is state sovereignty a "presupposition of our constitutional structure," *Blatchford*, 501 U.S. at 779, but history and the structure of the Constitution make implausible the notion that States and their officials could be sued in tribal court.

In *Blatchford* the Court found no "compelling evidence" that the Framers thought the States had waived their immunity in federal court with regard to tribes when they created the Constitution. Here the historical evidence is even more compelling. It was at least plausible to ask in *Blatchford* whether tribes might sue States in federal courts, for federal courts at least were contemplated at the time of the Convention. However, the same question regarding the States' waiver of immunity from tribal claims, though in tribal rather than federal courts, is astonishing even in its contemplation. "Tribal courts in the Anglo-American mold

were virtually unknown in 1789," *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987), when the nation was founded. "[M]ost Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.' H.R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834)." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978). Only in the twentieth century have tribal courts developed. *See generally Duro v. Reina*, 495 U.S. 676, 690-91 (1990). Plainly there was no original intent to waive the States' immunity in tribal courts.

The founders, to be sure, did not expressly address suits such as these. But their silence is best explained by the simple fact that "no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity" in the manner proposed. *Alden*, 527 U.S. at 741. And just as in *Alden*, it might be productively asked whether the States ever would have approved an express provision setting forth a waiver of state immunity that would allow tribal courts to exercise jurisdiction in the manner contemplated by the lower federal courts. "The supposition that it would is almost an absurdity on its face." 527 U.S. at 724 (*quoting Hans* at 14-15).

There also is no discernible historical record indicating that States were meant to be subservient to, or regulated by, tribes in any respect. The Commerce Clause, to be sure, establishes federal authority over commerce with the Indians. U.S. CONST. art. I, § 8, cl. 3. But it invites no diminution of state sovereignty in favor of tribal courts, or even federal courts. Any argument to the contrary is foreclosed by *Seminole Tribe*, 517 U.S. 44. Tribes at the time of the nation's formation were viewed as threats to the common security, not as participating sovereigns in a national government. *See* The Federalist No. 24 (Alexander Hamilton) (alluding to the "ravages and depredations of the Indians"), and The Federalist No. 25 (Alexander Hamilton) (discussing "Indian hostilities, instigated by Spain or

Britain"). These contemporaneous references to Indian Tribes refute any notion that the founders intended to make state sovereignty yield to tribal adjudicative powers.

The very structure of the Constitution that the Framers innovated also undermines this claim. "It is incontestable that the Constitution established a system of 'dual sovereignty,'" comprised of state and federal sovereigns. *Printz v. U.S.*, 521 U.S. 898, 918 (1997) (*quoting from Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). This bilateral structure permits no third berth for tribes. The balance in the system is found in the reciprocity of influence one sovereign has over the other. In particular, the Constitution assumes the States' "active participation in the fundamental process of governance." *Alden v. Maine*, 527 U.S. at 713. The States' role is made express in one part of the constitutional text after another. *E.g.* Article I, §§ 2 and 3; 17th Amendment; Article II, § 1; Article IV, § 3, cl. 1; Article IV, § 4.; Article V; Article VII.

The Constitution's dual sovereignty also presupposes a dual system of state and federal courts:

> The two together form *one system of jurisprudence*, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

Claflin v. Houseman, 93 U.S. 130, 137 (1876) (emphasis added). No precedent, tradition or any historical material, however, contemplates a role for tribal courts in this "one system of jurisprudence." The idea simply is foreign to the binary system the Founders created.

Professor Pommersheim poses what he considers to be the "essential quandary: Where do tribal courts fit within contemporary federalism and what is the doctrinal justification for the fit?" Frank Pommersheim, *"Our*

Federalism" In the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 149 (2000). The answer is that tribes do not fit into the Constitution's dual sovereignty at all. Neither the founders nor the Court has given any indication that tribes should hold a Constitutional status in parity with States and the Federal Government.

As the Court has ultimately made clear:

> Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from or exist in, subordination to one or the other of these.

United States v. Kagama, 118 U.S. 375, 379 (1886).

To invite tribes to share this constitutional power would introduce a destabilizing influence that precedent, history, and common sense simply do not support. The symmetry and mutuality of the Constitution would be lost if tribes were given an organic role in this dual system of government.

3. Tribal Court Jurisdiction Over State Officials Is Inconsistent With Limited Tribal Sovereignty.

Tribal adjudicatory jurisdiction over state officials is also inconsistent with tribal sovereignty as defined by federal law.[3] "[T]he existence and extent of a tribal court's

---

[3] Tribes are not sui juris; their jurisdiction is a question of federal law. "The question whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one

jurisdiction," the Court has instructed, "require a careful examination of tribal sovereignty [and] the extent to which that sovereignty has been altered, divested, or diminished." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985).

Jurisdiction of tribal courts cannot be separated from the more general characterization of tribes as limited sovereigns. Tribes are not equivalent to States; they are "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), and their sovereignty is of a "limited character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). They thus are subordinated to the superior power of the federal government. *United States v. Rogers*, 45 U.S. (4 How.) 567, 571 (1846). "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant*, 435 U.S. at 209. Unlike state sovereignty, "[a]ll aspects of Indian sovereignty are subject to defeasance by Congress." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 n.30 (1984).

As a result of the incorporation of Indian Tribes into the Nation, there are "inherent limitations on tribal powers." *Oliphant*, 435 U.S. at 209. These powers are "implicitly divested . . . by virtue of [tribes'] dependent status." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983). Such divested powers preclude tribes from transferring lands or exercising external political sovereignty, *Oliphant*, 435 U.S. at 209, and preclude them from exercising criminal jurisdiction over nonmembers, *id.* at 210-11.

---

that must be answered by reference to federal law." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985).

This case exposes—and, we respectfully submit, should establish—an additional divestiture of tribal power, only now apparent because Hicks has filed these novel lawsuits. Just as tribal assertion of criminal jurisdiction over nonmembers represented "a relatively new phenomenon," *Oliphant*, 435 U.S. at 196-97, so here do tribal court actions against state officials. "It is therefore not surprising to find no specific discussion of the problem before us in the volumes of the United States Reports." *Id.* at 197. The Tribe cannot demonstrate any tradition by which it or any tribe has ever exercised either adjudicatory or regulatory power over States. *Cf. Rice v. Rehner*, 463 U.S. 713, 720 (1983) (construing tribal sovereignty by reference to powers traditionally exercised by tribes). Even if such authority once existed, moreover, it surely was divested when the nation was formed. Such jurisdiction is "beyond what is necessary to protect tribal self-government or to control internal relations [and therefore] is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *South Dakota v. Bourland*, 508 U.S. 679, 694-95 (1993) (*quoting Montana*, 450 U.S. at 564).

Nor is this attempted extension of tribal power consistent with the theory of limited tribal sovereignty. Tribes have the "power to make their own substantive law in internal matters and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). "[T]he sovereignty retained by tribes includes 'the power of regulating their internal and social relations.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (*quoting United States v. Kagama*, 118 U.S. 375, 381-82 (1886)). Yet all of these are inwardly directed powers, limited in effect to tribal members. As the Court made clear in *Santa Clara Pueblo*, 436 U.S. at 55-56, these internal matters include tribal authority to control membership, *Roff v. Burney*, 168 U.S. 218 (1897), authority

over a tribe's inheritance rules, *Jones v. Meehan*, 175 U.S. 1 (1899), and authority over domestic relations, *United States v. Quiver*, 241 U.S. 602 (1916).

The Tribe's assertion of adjudicatory jurisdiction in the instant matter, however, is of a different order from the tribal powers recognized in these precedents. Mr. Hicks' claims are not based on questions of tribal membership, domestic relations, or probate, but instead are founded in non-traditional law, far removed from the essential "internal matters" referred to in *Kagama, Santa Clara Pueblo,* and *Mescalero Apache Tribe.*

Nor does *Williams v. Lee*, 358 U.S. 217 (1959), support this exercise of tribal power. *Williams* involved a non-Indian plaintiff suing an Indian defendant in state court for a debt incurred on a reservation. The Court's decision thus served as a shield for the Indian defendant. The result protected not only the tribe, but primarily the tribal member. This result is cut from the same protectionist cloth as many cases preceding and following it. *See, e.g., United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (tribes are accorded a "historic immunity from state and local control"). *Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-54 (1982) ("This Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference"); *Fisher v. District Court*, 424 U.S. 382 (1976) (the Court shielded an Indian mother from a state court adoption proceeding); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971) (the Court shielded a tribal member sued in state court on a food debt).

But in the instant case, the Ninth Circuit's decision recognizing tribal adjudicatory authority over state officials turns the shield of *Williams v. Lee* into a sword. The Tribe asks the Court to recognize tribal authority to render judgment against state officials for millions of dollars and

even the right to punish the state officials in tribal court and under tribal law. *See* P. App. at I-5 (Hicks' prayer for punitive damages). This is a quantitatively different kind of jurisdiction, one that dramatically departs from these precedents and from *Williams* itself.

4. State Immunity Protects Individually Named State Officials Sued In Tribal Court.

The lower courts, notably, did not confront the interplay of tribal and state sovereignty. Instead, their position was that, once Hicks dismissed his claims against the State and the official capacity defendants, the actions could proceed without regard to state sovereignty. In their view, "the Fallon Tribal Court has jurisdiction to adjudicate Hicks' claims against the state defendants in their individual capacities." P. App. at B-16; *see* also 196 F. Supp. at 1468. In agreeing that this pleading expedient allowed Hicks to have more access to the Nevada fisc than other residents of Nevada, the lower courts erred in several respects.

Individual capacity lawsuits, like relief under the *Ex Parte Young* doctrine, are creations of federal courts and of federal law. They have no application to claims brought in tribal courts under tribal law. An allegation in federal court that official conduct is contrary to the United States Constitution or a federal statute, it may be true, suffices "to override the State's protection" under the Eleventh Amendment because the official is treated as acting beyond his authority. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). No good reason exists, however, for extending these extraordinary doctrines beyond the circumstances that gave rise to them—principally the need for a national forum for vindicating federal rights and for ensuring their uniform application. *See Pennhurst*, 465 U.S. at 105 ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication

of federal rights."); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989).

Under similar circumstances, the Court has declined to extend these *ultra vires* doctrines beyond the setting of federal courts and federal law. In *Pennhurst*, 465 U.S. 89, individual claimants sued state officials for prospective injunctive relief under state law. They claimed the State's immunity from suit could be circumvented by alleging that the state actors had violated state law and therefore were necessarily acting *ultra vires*. The Court rejected this far-reaching theory, recognizing that it would "emasculate the Eleventh Amendment," *id.* at 106, thereby allowing all manner of claims against state officials (and effectively States) under any law and in any court. The Court first noted that "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Id.* at 105. It then noted that in balancing these interests, the Court had "declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States." *Id.* (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)).

Next, the Court observed that it had previously rejected similar extensions of these fictions. "In *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)," the Court observed, it "was faced with the argument that an allegation that a government official committed a tort sufficed to distinguish the official from the sovereign." *Pennhurst*, 465 U.S. at 112. In rejecting this argument in *Larson*, the Court noted "that it would make the doctrine of sovereign immunity superfluous. A plaintiff would need only to 'claim an invasion of his legal rights' in order to override sovereign immunity." *Id. (quoting Larson* at 337 U.S. at 693). Finally, for many of the same reasons that the Court declined to extend this fiction in *Larson*, it declined to extend it in *Pennhurst* because it "would make the

constitutional doctrine of sovereign immunity a nullity." *Id.* at 112. *See also Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945) ("When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants.").

The Court should likewise decline to extend these *ultra vires* principles to a claim under tribal law filed in tribal court. No legal basis or authority exists for disregarding state immunity rules in this area. Nevada law treats these lawsuits as claims against the State and accordingly they may be prosecuted only in state court. Because Hicks has not complied with these requirements, his tribal-law claims must be dismissed as barred by Nevada principles of sovereign immunity.

5. Tribal Law Does Not Unambiguously Abrogate State Immunity From Suit.

Even if the Tribe has inherent authority to abrogate the State's immunity from suit, it should be held to the same standard as other sovereigns in exercising this extraordinary power. Specifically, to the extent the Tribe claims authority to regulate States and state officials, it must unambiguously express that intent. *Seminole Tribe*, 517 U.S. at 55. Courts presume that one sovereign will not casually regulate another. Congress, for instance, must unequivocally state its intent to regulate the States. *Gregory v. Ashcroft, supra*; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). The same is true for other sovereigns. *Cf. Schooner Exchange v. McFadden*, 11 U.S. 116, 146 1812); *Benz v. Compania Naviera Hidelgo*, 353 U.S. 138, 147 (1957). The Tribe has expressed no such intent here, however, and for this independent reason the claims must be dismissed.

Hicks filed multiple tribal-law claims against Nevada and its officials. None contains a precedential or statutory

foundation for abrogating any State's, or all States', immunity from suit. The tort claims have no statutory basis at all; they are founded only in tribal "common law." Without at least a foundation in positive law, such tribal claims cannot even be adequately evaluated when legally challenged. Their lack of definition invites a morass of litigation to define fundamental issues, such as authority for off-reservation service of process and other documents, scope and effect of state immunity, limits on tribal authority to exceed state damages caps, tribal authority in official capacity suits against the State, rules of evidence, tribal authority to compel discovery and attendance of witnesses, enforcement of judgments, and rights of appeal or other review in federal courts. Questions of immunity alone invite, in this case, many more years of litigation if the Ninth Circuit's decision to remand the case to tribal court is affirmed. Off-reservation collection of any judgments invites still more.

Moreover, there are twenty-six tribes and bands in Nevada alone. Answers to each of these questions will be different for each tribe. To the extent federal courts serve as arbiters in these matters, this promises a breathtaking field for federal common law development. To the extent the State must litigate to find answers in each of the tribal courts, its resources of course will be adversely affected as well.

The lack of tribal guidance regarding answers to these questions confirms the merit of requiring immunity to be unambiguously abrogated, and the claims specifically explained, before state defendants are called to answer in tribal courts. If the tribes, in short, wish to be treated as sovereigns, they must act as sovereigns, by clearly stating an intent to abrogate state immunity, and by explaining the applicable procedures. The Tribe's failure to do so here requires dismissal of these tribal law claims.

B. The § 1983 Claim Must Be Dismissed.

Many of the same principles that require dismissal of the tribal-law claims also require dismissal of the § 1983 claim. Congress failed clearly to make this cause of action applicable in tribal courts and, at any rate, lacked the power to do so.

1. A Congressional Waiver Of States' Immunity In Tribal Courts Under Federal Law Must Be Unambiguously Expressed.

Analysis of the § 1983 claim starts with first principles, foremost among them the tenet that one sovereign may not lightly regulate another. The States for example may not regulate the Federal Government at all. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *Cf. Westfall v. Erwin*, 484 U.S. 292 (1988). And the Federal Government may not regulate the States except under discrete delegations of power and except when Congress complies with carefully prescribed limitations on the exercise of those powers.

One of the most critical limitations on this power is a stringent presumption against regulation of state action and alteration of the federal-state balance in the absence of a clear statement. Recognizing that "the States' immunity from suit is a fundamental" attribute of "sovereignty," *Alden*, 527 U.S. at 713, and that the immunity is designed to preserve the "constitutional balance between the Federal Government and the States," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985), the Court has not casually inferred abrogations of it. Only an "intention to abrogate the States' immunity unmistakably clear in the language of the statute" will suffice. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 635 (1999) (quotation omitted). Whether stated as an "unmistakably clear" requirement, *Atascadero*, 473 U.S. at 242, as an unequivocal and textual" requirement,

Dellmuth v. Muth, 491 U.S. 223, 230 (1989), or merely as a "clear statement" rule, *Will*, 491 U.S. at 65 (quotation omitted), the point is the same: Congress must leave no doubt about its intentions.

2. Section 1983 Does Not Create A Cause Of Action Against State Officials Enforceable In Tribal Courts.

Abundant doubt surrounds assertion of a § 1983 claim in tribal courts, and accordingly Congress did not satisfy this "strict standard." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). Text, history, and precedent all indicate that Congress did not authorize the filing of § 1983 claims in tribal courts.

Consider first the language of the statute:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983. Nothing in the statute discloses any authority to bring claims in tribal court. That fact alone should suffice to defeat this anomalous claim. A Congress respectful of the States' role in the constitutional framework presumably would have alerted state officials that they could be exposed to these actions in foreign jurisdictions had they so intended. Just as surely, the States in 1871, whether from the North or the South, would never have acquiesced in such an unusual incursion on their authority.

In construing § 1983 in the past, the Court has looked "both to history and to the 'special policy concerns involved in suing government officials.'" *Richardson v. McKnight*, 521 U.S. 399, 404 (1997) (*quoting Wyatt v. Cole*, 504 U.S. 158, 167 (1992)). Neither "history" nor the "special policy concerns" applicable to actions against state officials in federal court, however, support such actions in tribal courts.

History, for example, confirms the textual skepticism that greets this claim. Even if Congress could comply with the clear-statement rule through the legislative history of § 1983, which it may not, *United States v. Nordic Village*, 503 U.S. 30, 37 (1992), the history of the Act is mute on the issue of tribal courts. Nor as a matter of Indian history should that omission come as a surprise. Tribal courts, as noted above, did not take root until two to three generations *after* Congress enacted § 1983 in 1871. "Until the middle of this century, few Indian tribes maintained any semblance of a formal court system." *Oliphant*, 435 U.S. at 197. *See generally Duro v. Reina*, 495 U.S. 676 (1990); Nancy Thorington, *Civil and Criminal Jurisdiction Over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 981 (2000) (finding that tribal courts did not even exist in rudimentary form until the 1880's).

A "policy concern[]" militating against extending civil rights jurisdiction to tribal courts is the chilling effect tribal adjudicatory jurisdiction would have on tribal-state relations. Many areas of governmental jurisdiction may be appropriately and prosperously shared between tribal and state, or tribal and local, governments. But this kind of cooperation would be discouraged if state officials were open to suit in tribal courts. This effect has already been foreseen. *See State of Montana v. Gilham*, 932 F. Supp. 1215, 1224 (D. Mont. 1996), *aff'd*, 127 F.3d 897 (9th Cir. 1997).

Precedent, too, undermines this claim. The Court's cases all refer to the availability of § 1983 claims in federal or state courts, but say nothing about their availability in tribal courts. In *Monroe v. Pape*, 365 U.S. 167, 180 (1961), the Court said that "[i]t is clear that one reason the legislation was passed was to afford a federal right in federal courts." *Monroe* should not be extended here. And in *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 506 (1982), the Court said that "many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system." However, the Court has never said anything more about forum availability, and specifically has never suggested that Congress intended such claims to be brought in tribal court.

Furthermore, as noted below and suggested above, such actions raise vexing constitutional questions about a third tier of sovereigns within a bilateral national sovereignty. Premature consideration of those questions should be avoided, the Court has recently reminded litigants, when a plausible interpretation of the statute exists that would avoid these questions. *Jones v. United States*, 120 S. Ct. 1904, 1911 (2000).

3. Congress Lacks Authority To Create Any Such Cause of Action.

Even if Congress unambiguously purported to expose state officials to § 1983 claims in tribal courts (which it assuredly did not), it lacked authority to do so. When a state asserts its immunity from suit, that immunity controls in the absence of a constitutionally permissible abrogation of it, wherever the underlying claim is filed. *See Alden*, 527 U.S. 706. Yet no source of authority for abrogating that immunity exists here.

No constitutional basis exists for compelling the State or its officials to answer to tribal courts (as opposed to federal courts) for claims grounded in federal law. Nothing

in the Indian Commerce Clause or the Fourteenth Amendment purports to authorize such actions. Neither the Tribe nor the lower courts have identified any such authority. Instead, both the respondents and the lower courts have started with the presumption that § 1983 is a permissible exercise of congressional power (which it is, so far as it customarily goes), then leaped to the conclusion that because Hicks brought these claims against the officials in their "individual capacity," Nevada's immunity has no relevance. No support, however, exists for this wholesale transfer of federal individual capacity doctrine to the unique setting of tribal courts.

As an original matter, the Court's individual-capacity doctrine states a paradox in the context of § 1983 claims. It maintains on the one hand that state officials sued in their individual capacity are not acting under state law for purposes of sovereign immunity under the Tenth and Eleventh Amendments, but on the other hand that state officials are acting "under color" of state law for § 1983 purposes. *See Pennhurst*, 465 U.S. at 105 (referring to the doctrine as a "well-recognized irony"). Yet no basis exists for extending this doctrine to claims filed outside of the federal courts. Not only would extending it to the tribal courts fail to advance the objective of having a uniform interpretation of federal law, but it also would positively undermine it. The fact is, there exists no true right of federal appeal from tribal courts, and accordingly civil rights actions in tribal fora would lead to disarray in the development of federal statutory and constitutional law.

As a matter of comity, moreover, § 1983 enforcement in tribal courts does not make sense because tribal officials are not subject to the Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Accordingly they may not be subjected to § 1983 claims. Tribal judges therefore will have little reason to be sensitive to competing policy concerns that influence rulings in state or federal courts.

Unlike other individual capacity cases, no special need exists to create a new remedy in tribal court, since there are federal and state courts already available to afford relief. Hicks acknowledged he could have brought his actions in state court, or in federal court, but for convenience, chose to file in tribal court. This thus is not a constitutional theory that "would absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities." *Hafer v. Melo*, 502 U.S. 21, 28 (1991).

Finally, if § 1983 actions may lie in tribal courts against state officials, then on the same logic, *Bivens* claims against federal officials may also lie. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). To our knowledge, no constitutional case supports this extension of tribal jurisdiction. Neither is any such extension permissible with regard to state officials.

II. STATE OFFICIALS' CLAIMS OF SOVEREIGN AND QUALIFIED IMMUNITY SHOULD BE DECIDED TOGETHER WITH THE QUESTION OF TRIBAL COURT JURISDICTION.

As shown, the claims against Petitioners all amount to claims against the State and, accordingly, must be dismissed because Indian Tribes lack authority to abrogate the State's immunity from suit. Even if that is not true, however, the defendants' immunity defenses should have been considered with the jurisdictional issue.

In their first tribal court appearance, the Nevada officials asserted immunity as a bar to tribal jurisdiction. *See e.g.* P. App. at J-3 to J-6 (State's Motion to Quash). They maintained this posture at every step thereafter. K-1 to K-13 (State's Supplemental Brief). *See also* Dist. R. at 25:422 (state's appeal to Intertribal Appellate Court), Dist. R. at 25:426-430 (State's post-hearing brief on appeal). Hicks, for his part, engaged the issue as well, extensively

describing why he thought the State's immunity did not bar jurisdiction. Dist. R. at 25:64-75, 100-102, 200-203, 206-32, 255-90, 315-70, and 448-60.

The tribal court in the end ruled that "it is not prevented by doctrines of sovereign or qualified immunity from lawfully exerting personal jurisdiction over specially appearing State defendants." P. App. at L-1 (*quoted at* 196 F.3d at 1030). The Intertribal Court of Appeals in turn called the State's immunity arguments "only . . . an extension of their unsuccessful argument in . . . *Nevada v. Hall*." P. App. at C-7.

Notwithstanding all of this, the Ninth Circuit determined that "the state did not exhaust its remedies regarding the sovereign immunity defense before the tribal court." 196 F.3d at 1029. The court of appeals justified its conclusion in part by characterizing sovereign immunity as an affirmative defense rather than a jurisdictional one. *Id.* at 1029 n.12. Consequently, the Ninth Circuit determined that the issue should be returned to tribal court. 196 F.3d at 1032.

As an initial matter, the Ninth Circuit's ruling on exhaustion should be reversed because the tribal courts clearly did decide the questions of immunity. But even if the appellate court's factual conclusion was correct, it improperly established a two-step procedure for exhaustion of immunity issues. It required state officials to exhaust all jurisdictional issues in tribal court, then separately exhaust immunity issues. This procedure is not justified by the Court's precedents, it is burdensome, and it undermines the purpose of immunity.

A. Immunity Must Be Considered Along With The Jurisdictional Determination.

1. This Court's Decisions Consider Immunity As Part Of The Jurisdictional Inquiry.

Sovereign immunity and jurisdiction are inextricable. This Court has already refuted the argument that a state's immunity "does not confer immunity from suit, but merely a defense to liability." *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-46 (1993). The argument was rejected because it

> misunderstands the role of the [Eleventh] Amendment in our system of federalism: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. 443, 505, 31 L. Ed. 216, 8 S. Ct. 164 (1887).

Id. at 146. *See also Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119-20 (1984).

The Court's most recent decisions confirm that the Ninth Circuit fundamentally misapprehended the fact that sovereign immunity is indeed a jurisdictional defense. In *Seminole Tribe of Fla.*, 517 U.S. at 52-53, the court of appeals:

> disagreed with the District Court . . . that the Indian Commerce Clause grants Congress the power to abrogate a State's Eleventh Amendment immunity from suit, and *concluded therefore that it had no jurisdiction* over petitioner's suit against Florida." [Emphasis added.]

This Court affirmed. It explained that

> It was well established . . . that the Eleventh Amendment stood for the constitutional principle that

> state sovereign immunity limited the federal courts' jurisdiction under Article III.

517 U.S. at 64.

The Court followed the same approach—referring to immunity in order to determine jurisdiction—in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 691 (1999) ("we hold that the *federal courts are without jurisdiction* to entertain this suit against an arm of the State of Florida") (emphasis added); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 638 (2000) (affirming dismissal of three actions, including one in which a state litigant had "moved to dismiss the suit for lack of subject matter jurisdiction, contending it was barred by the Eleventh Amendment"); and *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) ("Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power."). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 265 (1997) (in action against State as well as its individually-named officials, "defendants moved to dismiss the Tribe's complaint on Eleventh Amendment immunity grounds," and the action was dismissed).

Thus the State's immunity should have been examined in order to determine the tribal court's jurisdiction, and not reserved for later treatment. The Ninth Circuit's conclusion to the contrary constitutes reversible error.

2. Tribal Immunity Is Treated As Part Of The Jurisdictional Inquiry.

Nor do tribes treat this issue differently when they are sued. Because mutuality of amenability to suit is one of the cardinal principles the Court has looked to in deciding immunity issues arising between Indian Tribes and States, *Blatchford*, 501 U.S. at 782, a brief comparison is warranted.

Claims of sovereign immunity are considered jurisdictional when raised by tribal officials. *See e.g. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit"). *See also Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416, 417-18 (9th Cir. 1989) (suit against tribe dismissed when "Band filed a motion to dismiss for lack of personal and subject matter jurisdiction and failure to state a claim," and Circuit held that "the issue of tribal sovereign immunity is jurisdictional in nature"); *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989) ("issue of tribal sovereign immunity is jurisdictional in nature"); and *Arizona Public Service Co. v. Aspaas*, 69 F.3d 1026, 1032 (9th Cir. 1995) (tribal sovereign immunity is jurisdictional in nature).

When tribal officials are sued, moreover, federal courts address tribal and individual defenses together to determine jurisdiction over them. *See e.g. Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991), *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985), *Cameron v. Bay Mills Indian Community*, 843 F. Supp. 334, 336 (W.D. Mich. 1994). Mutuality requires that state immunity be given the same jurisdictional effect as tribal immunity. *See Blatchford, supra.*

B. The Tribal Court Exhaustion Rule Is Prudential, And The Policies Underlying It Do Not Support The Independent Exhaustion Of Immunity.

Even if the immunity of state officials is separated from the jurisdictional determination, the tribal court exhaustion rule does not require the case to be returned to tribal court for still further consideration. This prudential rule has no application here.

The decisions in *National Farmers Union Ins. Cos.*, 471 U.S. 845 and *Iowa Mutual Ins. Co.*, 480 U.S. 9 "describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 448 (1997). The rule, however, is "not an unyielding requirement." *Id.* at 449 n.7. It is "'prudential,' not jurisdictional." *Id.* at 451. Exhaustion is not required when it is apparent that "state or federal courts will be the only forums competent to adjudicate" certain disputes. *Id.* at 459 n.14. In such cases, "the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay." *Id.* This is just such a case. No matter how the issues in this case are characterized, only state or federal courts may decide the claims Hicks makes against the state officials.

No less importantly, delay in deciding the immunity claims vitiates the very immunity being asserted. The "value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct*, 506 U.S. at 145. Assertions of immunity were first made in this case in 1991. P. App. at J-1 to J-7. The tribal court had generous opportunities to decide the immunity issues. This Court has never said that exhaustion requires the tribal courts to make a ruling, only that they be afforded an *opportunity* to do so. *E.g.*, *National Farmers Union*, 471 U.S. at 857; *Iowa Mut. Ins. Co.*, 480 U.S. at 16; *Strate*, 520 U.S. at 451. At some point the federal interest in promoting tribal self-government must be balanced against other competing policies, such as those protecting state immunity or promoting efficient justice for the named individuals.

Finally, the individual state officials deserve an early decision on their qualified immunity defense, and should be accorded relief in federal court when the tribal court fails to grant relief promptly. Individual immunity was raised by

the State in July of 1991. P. Exh. at J-5 to J-6. The qualified immunity enjoyed by an official is immunity from suit, and it is lost if not decided at the earliest stages of litigation. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

> [A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.

Conn v. Gabbert, 526 U.S. 286, 290 (1999) (citations omitted). This order of procedure is designed to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (*quoting Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). To spare the four Nevada officials from unwarranted litigation demands, all that the State asked the tribal court, then the federal court, to do was this: determine whether Hicks had alleged the violation of an "actual constitutional right at all." All of this was to no avail, however.

The paradigmatic example of this delay is former Division of Wildlife Administrator, William Molini. The only place his name appears in case CV-FT-091-034 is in the caption of the original complaint. P. App. at H-1. It appears *nowhere* in the current version of the complaint. P. App. at I-1 to I-5. Hicks has amended the complaint four times; the tribal court had three years and four different complaints to discern that no allegation is made that Molini violated a federal right; the federal courts have had six additional years. Nothing could be added by further delay. Yet none of the courts has dismissed the action against Mr. Molini. The Ninth Circuit's return of this matter to tribal court after nearly ten years is difficult, if not impossible, to justify as a matter of judicial efficiency or fairness.

III. NEITHER *MONTANA* EXCEPTION TO THE PRESUMPTION AGAINST TRIBAL JURISDICTION OVER NONMEMBERS SUPPORTS THE NINTH CIRCUIT'S DECISION.

Even if tribal jurisdiction is not barred by sovereign or individual immunities, jurisdiction is absent here, based upon *Montana v. United States*, 450 U.S. 544 (1981). The *Montana* decision is "the path marking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 445. *Montana* creates a main rule and two exceptions. The main rule is the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. The exceptions exist where there is either (1) consent of the nonmember to tribal jurisdiction, or (2) nonmember "conduct [which] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Neither exception applies here.

A. Under *Montana*, The Tribe Lacks Jurisdiction Over These State Officials In This Case.

1. The Main Rule Of Presumption Against Tribal Jurisdiction Applies Here.

Montana's "general rule and exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute." *Strate*, 520 U.S. at 449. There are no treaties or statutes that delegate any adjudicatory authority to the Fallon Paiute-Shoshone Tribes. Therefore the general rule applies, and tribal jurisdiction over nonmembers is presumed not to exist.

2. *Montana's* First Exception Does Not Apply.

The first *Montana* exception states that "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual

relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. The scope of this exception was limited in *Strate* to the types of activities involved in *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980). Dissimilar activities are not "of the qualifying kind." *Strate*, 520 U.S. at 457.

The relationship between the Tribe and state officials performing official functions is nothing like the fact patterns in which the Court has found such consent. In *Williams v. Lee*, the defendants operated a business venture on a reservation and entered into commercial transactions with tribal members. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, the defendants engaged in taxable commercial transactions. And in *Morris v. Hitchcock*, the defendant conducted commercial transactions on the reservation.

To the extent the state officials' conduct parallels any prior case in this respect, it is *Strate*. There, the defendant was an employee of a non-Indian subcontractor who entered into a contract with a tribal corporation. *Strate*, 520 U.S. at 457. That contract did not create the qualifying kind of consensual relationship for *Montana* purposes, the Court held, because the injured tribal plaintiff "was not a party to the subcontract, and the Tribes were strangers to the accident." *Id.* at 457 (quotation omitted). Similarly, in this case, Hicks was not a party to the relationship between the state officials and the Tribe, and the Tribe is a stranger to any damages alleged by Hicks.

Neither may these principles be circumvented by the claim that entry upon tribal land amounts to constructive consent to the tribal court's jurisdiction. That would allow a tribe to eliminate *Montana's* main rule merely through a unilateral legislative act creating the necessary consent as a

constructive waiver of immunity. Precedent forecloses this theory. *See College Savings, supra*.

3. *Montana's* Second Exception Does Not Apply.

The second *Montana* exception provides tribes with authority over nonmembers when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Yet, as *Strate* illustrates, a tribe's inherent power does not reach "beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459 (*citing Montana*, 450 U.S. at 564). The everyday activities of the state officials in this case hardly qualify under this standard. The state officials sought and were expressly given authorization by the tribal judge to be on the Reservation, and tribal police officers accompanied the officials to the Hicks residence. There is no allegation that the officials were any threat to the Tribe's political integrity or control of its members; nor could there be on this record.

Proving the point, the claims filed by Hicks allege injury to him personally, not to the Tribe. The two incidents from which Hicks alleges injury were isolated incidents that, of themselves, could not plausibly threaten the Tribe.

The district court determined that this case falls within the second exception because "the Tribe has an interest in providing Mr. Hicks, and any other tribal member similarly situated, a forum in which to vindicate these rights." P. App. at B-13. However, the Tribe's generalized interest in providing a forum for its members is not the type of tribal interest that was described in *Montana*. Because the tribal court plaintiff could file a state or federal action to protect her individual interests, "[o]pening the Tribal Court for her optional use is not necessary to protect tribal self-government." *Strate*, 520 U.S. at 459. In *Strate*, the Court

also rejected the tribes' *general* interest in the health and welfare of tribal members as sustaining the exception. "Those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule." *Strate*, 520 U.S. 457-58. The same rationale applies here.

B. *Montana's* Rule Applies To All Nonmember Cases Without Reference To Land Status.

In the Ninth Circuit's view, however, *Montana* does not apply at all to this case. In one respect, we agree: because tribes lack authority to abrogate a State's and its officials' immunity from suit, neither the *Montana* rule nor its exceptions need to be considered. But that is not what the Ninth Circuit held. It converted the *Montana* presumption against tribal jurisdiction into a presumption in favor of jurisdiction when the alleged misconduct occurs on tribal land. That is wrong.

1. Precedent Supports *Montana's* Broad Reading.

In *Montana*, the Court relied upon *United States v. Wheeler*, 435 U.S. 313, 326 (1978), *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978), all of which stand for the broad proposition that tribes have been divested of powers inconsistent with their status, among them the power to exercise jurisdiction over nonmembers. *See also Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). *Montana* confirmed the sweeping nature of this rule: "the principles on which [*Oliphant*] relied support the *general proposition* that inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565 (emphasis added). So do later

cases. *See, e.g., County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 267 (1992); *Duro v. Reina*, 495 U.S. 676, 687-88 (1990); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality); *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) ("after Montana, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation'").

In establishing a categorical rule that Indian Tribes do not have criminal jurisdiction over nonmembers, *Oliphant* relied heavily on the interests and expectations of nonmembers, including their right to be protected from "unwarranted intrusions on their personal liberty" in tribal courts. *Oliphant*, 435 U.S. at 210. *See also Strate*, 520 U.S. at 459 (considering whether nonmember ought to be made to appear "in an unfamiliar court"). *Oliphant* also relied upon the historical status of tribes to define their present day jurisdiction, and on this basis determined that criminal jurisdiction over non-Indians was inconsistent with tribal status. *Oliphant* 435 U.S. at 197-98. The Court gleaned from the historical record an "unspoken assumption" that tribal jurisdiction over nonmembers does not exist. *Id.* at 203.

United States v. Wheeler, 435 U.S. 313, 326 (1978), is to like effect. The Court described the limited retained powers of tribes as those sovereign powers that were not withdrawn by treaty, statute, or "by implication as a necessary result of their dependent status." *Id.* at 323. Such implicit divestiture, the Court added, has occurred in areas "involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326. Tribal self-government in contrast principally "involve[s] only relations among members of a tribe." *Id.*

Conspicuously missing from *Oliphant*, *Wheeler*, and even *Montana* is any compelling indication that the general presumption against jurisdiction should turn on land status.

None of the precedents establishes a distinction based on that factor. And a tribe's relationship with a nonmember, even on tribal land, simply is not generally an internal matter necessary for self-government.

Lastly, it deserves mention that control of nonmembers originally fell to federal authorities. *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832) ("Indian nations were, from their situation, necessarily dependent on the [United States] . . . for the protection from the lawless and *injurious intrusions* into their country.") (emphasis added); *Wheeler*, 435 U.S. at 323-26 (tribes' "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised"). This historical dependence upon the federal government for protection from nonmembers is inconsistent with a residual right of tribes to exercise self-help, especially if such self-help includes within it remedies above and beyond legitimate expulsion. The tribes' historical reliance on the United States for protection, together with the absence of any treaty or statutory provisions establishing their own power over nonmembers, signify a divestiture of such power, requiring congressional restoration if it is to be asserted here.

2. Subsequent Decisions Have Not Limited The *Montana* Presumption.

Nothing decided since *Montana* has limited the application of its presumption against tribal jurisdiction. The two principal decisions that followed *Montana* expressly did not decide the proper rule for nonmember conduct on tribal land.

Contrary to the Ninth Circuit's decision, *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), does not alter this presumption based on land-ownership. All that was at issue in *El Paso* was whether lower federal courts

properly applied the doctrine of tribal exhaustion. 526 U.S. at 473. Exhaustion was determined unnecessary because the federal Price-Anderson Act requires that claims arising under it be heard in federal court. The Court did not address whether the tribal court had jurisdiction in the absence of the Act. That issue was not presented, as appeal of the tribal court's denial of injunctive relief was sought by the nonmember companies, "whether or not [the tribal] courts would have jurisdiction to exercise in the absence of the [Price-Anderson] objection." 526 U.S. at 485. The Court thus expressly declined to address the issue. 526 U.S. at 483 n.4.

Strate also left the question open. It involved a lawsuit arising from an accident that occurred on a state highway, and to which the Court applied *Montana*. The Court preceded its analysis with the proviso that "[w]e express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." 520 U.S. at 442. In doing so, it did not prescribe a different rule for application on tribal land, nor did it reject *Montana*'s application on such land. Again the issue was left undecided.

3. The *Montana* Rule Protects Inherent, Retained Tribal Powers, Including The Right To Exclude.

In refusing to follow this approach, the Ninth Circuit concluded that the "Tribe's unfettered power to exclude state officers from its land implies its authority to regulate the behavior of non-members on that land." 196 F.3d at 1028. This reasoning, however, turns on a false dichotomy. Even assuming for the sake of argument that the Tribe maintains the same rights to exclude nonmember state officials that it has to exclude other nonmembers, this right may still be construed consistently with *Montana's* general presumption, and not as a source of general adjudicatory jurisdiction.

Tribal control over land, indeed, is a factor that the *Montana* exceptions already consider. The first *Montana* exception, based upon consent by the nonmember, allows jurisdiction over commercial uses occurring *on* tribal lands. It thus pertains in many cases to nonmembers present on tribal land, making use of tribal resources for their own gain. *Montana's* second exception is also protective of tribal territory, permitting jurisdiction over nonmembers who represent a threat to tribal political and economic integrity, or to the health and welfare of the tribe. These exceptions in short already account for land-based concerns whether stemming from the right to exclude or from any other considerations.

4. Tribal Adjudicatory Jurisdiction Should Not Depend Upon Land Status In Indian Country.

Land status also is an unreliable basis upon which to determine tribal adjudicatory jurisdiction. Indian-owned allotments such as Mr. Hicks' are subject to conveyance out of Indian ownership. A jurisdictional presumption that shifts, based upon changing Indian ownership of allotments, would prove unworkable. It also would give no notice to nonmembers, whose susceptibility to tribal jurisdiction would turn on the most recent land transactions.

Permutations of land ownership also know no bounds. Jurisdiction that depends on land ownership characterized by the member/nonmember dichotomy may become impossible to define with divisible heirships, marriages, and devises. *See Hodel v. Irving*, 481 U.S. 704, 718 (1987) (finding "little doubt that the extreme fractionation of Indian lands is a serious public problem"). Conveyance of less than fee interests into non-Indian ownership will also confuse jurisdiction. A model for adjudicatory jurisdiction based on ownership invites unending litigation and uncertainty.

C. *Montana* Should Apply In This Case Because The Tribe Approved The State Actions.

Even assuming *arguendo* that the *Montana* rule does not normally apply to activities on Indian-controlled land, the *Montana* analysis should nonetheless apply in this case because the tribal judge approved the state officials' entry onto the Reservation. This rendered the Hicks allotment, for nonmember governance purposes, the functional equivalent of alienated, non-Indian land. *See Strate*, 520 U.S. at 454-57 (referring to land on which the tribe provided a state right-of-way as equivalent to non-Indian alienated land because Tribe waived gatekeeping right).

By expressly approving the State's search warrant in this case, the Fallon Tribe ceded its gatekeeping right, and thus alienated its control over Hicks' allotment at least for the purpose of executing the second warrant. The Tribe's surrender of its right to exclude the state officers justifies applying *Montana's* general presumption against tribal jurisdiction over nonmembers. *See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 423-24 (1989) (plurality opinion) (without right to exclude nonmembers, "that power can no longer serve as the basis for tribal exercise of the lesser included power [to regulate]").

CONCLUSION

Fifty States make up the Union. The courts of the States, together with the federal courts, form the jurisprudential infrastructure of the nation. The Constitution provides procedures for addition of other States to the Union; it provides none for admission of other governments. If admission of tribes and their courts as participants in the national government is to be done, it must occur by federal statute or by constitutional amendment.

Nevada of course does not seek to discourage the Tribe's self-determination or its self-government. However,

the State must also carefully guard its own sovereign prerogatives, including its immunity. It therefore requests that the Ninth Circuit's decision be reversed; that state immunity be deemed to bar all claims in tribal courts brought against a state or its officials in any capacity, when those claims arise from actions taken by officials in their role as state employees; and that the matter be remanded to the federal district court for entry of judgment in favor of the State and its officials.

Respectfully submitted,

Of Counsel:
JEFFREY S. SUTTON
Jones, Day, Reavis & Pogue
1900 Huntington Center
41 South High Street
Columbus, OH 43215
(614) 469-3855

FRANKIE SUE DEL PAPA
Attorney General of the State of Nevada
C. WAYNE HOWLE
(*Counsel of Record*)
Senior Deputy Attorney General
PAUL G. TAGGART
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1227

Counsel for Petitioners

November 2000

JAN 19 2001

No. 99-1994

Supreme Court, U.S.
FILED
JAN 19 2001
CLERK

In The

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,

Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS THE TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES AND THE HONORABLE JOSEPH VAN WALRAVEN IN RESPONSE TO BRIEF FOR PETITIONERS

KIM JEROME GOTTSCHALK
Counsel of Record
MELODY MCCOY
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

January 19, 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a tribal court has jurisdiction over civil suits brought by a tribal member against state game wardens in their individual capacities, for alleged illegal and tortious conduct by the wardens arising out of the execution of search warrants on the member's trust allotment land within the tribe's reservation.

2. Whether immunity defenses that may be available to the game wardens, who have been sued in tribal court in their individual capacities, should be adjudicated by the tribal court prior to any federal court intervention.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. INTRODUCTION 9

II. THE TRIBE HAS INHERENT JURISDICTION OVER THE ACTIONS PENDING IN TRIBAL COURT 12

A. Tribes Have Inherent Jurisdiction Over Their Members And Their Territory 12

B. The Presumption Of Inherent Tribal Jurisdiction Governs This Case Arising On Indian Trust Land 16

C. Alternatively, Assuming *Arguendo* That The *Montana* Conditions For Tribal Jurisdiction Over Non-Indian Conduct On Non-Indian Fee Land Must Be Met In This Indian Trust Land Case, The Conditions Are Met Here 22

1. There was a Consensual Relationship between the Wardens and the Tribe because the Wardens Voluntarily Recognized the Tribe's Sovereign Authority, Processes, and Procedures, and the Tribal Court Exercised Supervisory Authority Over The Wardens' Conduct on the Reservation 23

2. The Wardens' Enforcement of State Law and Allegedly Actionable Behavior on the Reservation Threatens and Affects the Tribe 25

TABLE OF CONTENTS – Continued

Page

III. THE STATE'S SOVEREIGN IMMUNITY FROM SUIT IS NOT AN ISSUE IN THIS CASE BECAUSE THE STATE IS NOT A PARTY TO THE UNDERLYING ACTIONS IN TRIBAL COURT 27

A. The Actions In Tribal Court Are Individual Capacity Suits And Therefore Sovereign Immunity Is Not Implicated..... 27

B. There Is No Reason For A Different Rule As To Individual Capacity Suits Because Tribal Court Jurisdiction Is At Issue 31

1. The Constitution Makes Tribal Sovereignty Subordinate only to the Federal Government, not the States, let alone State Officers in their Individual Capacities 31

2. Notwithstanding The Few Instances of Implicit Divestment This Court Has Found, It Is Not Called For Here Where Federal Law and Policy Support Jurisdiction 34

IV. THE RULINGS BY THE COURT OF APPEALS REGARDING ADJUDICATION OF THE AFFIRMATIVE DEFENSES ARE CONSISTENT WITH THIS COURT'S DECISIONS IN THE AREA OF JUDICIAL CIVIL PROCEDURE AND THE TRIBAL EXHAUSTION RULE 38

A. It Is Firmly Established That Affirmative Defenses Are Non-Jurisdictional 38

B. The Affirmative Defenses Have Not Been Exhausted In This Case Because The Tribal Court Has Not Yet Ruled On The Merits Of Any Such Defenses..... 40

TABLE OF CONTENTS – Continued

Page

V. AS COURTS OF GENERAL JURISDICTION COMPETENT TO APPLY FEDERAL LAW, TRIBAL COURTS HAVE JURISDICTION OVER ACTIONS UNDER 42 U.S.C. § 1983... 44

CONCLUSION 47

TABLE OF AUTHORITIES

Page

CASES

A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986), *cert. denied*, 476 U.S. 1117 (1986) 46

Alden v. Maine, 527 U.S. 706 (1999) 8, 28

Anderson v. Creighton, 483 U.S. 635 (1987) 42

Arizona, ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970) 25

Biscoe v. Arlington County, 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) 25

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 32, 34

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) 21

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 13, 15, 35

Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985) 28

Dennis v. Higgins, 498 U.S. 439 (1991) 9, 46

Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) 28

Duro v. Reina, 495 U.S. 676 (1990) 36, 37

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 18, 19, 45

FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) 24

Farid v. Smith, 850 F.2d 917 (2nd Cir. 1988) 28

TABLE OF AUTHORITIES – Continued

Page

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 44

Gomez v. Toledo, 446 U.S. 635 (1980) 39

Griess v. Colorado, 841 F.2d 1042 (10th Cir. 1988) 28

Hafer v. Melo, 502 U.S. 21 (1991) ..... *passim*

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 39

Howlett v. Rose, 496 U.S. 356 (1990) 43, 46

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) ..... *passim*

Jackson v. Georgia Department of Transport, 16 F.3d 1573 (11th Cir. 1994), *cert. denied*, 513 U.S. 929 (1994) 28

Jefferson County v. Acker, 527 U.S. 423 (1999) 39

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) 35

Kentucky v. Graham, 473 U.S. 159 (1985) 30

Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc., 523 U.S. 751 (1998) 39

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 33

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 7, 15, 18, 44

Mitchell v. Forsyth, 472 U.S. 511 (1985) 41, 42

Monaco v. Mississippi, 292 U.S. 313 (1934) 34

Monell v. New York City Department of Soc. Services, 436 U.S. 658 (1978) 9, 44, 46

Montana v. United States, 450 U.S. 544 (1981) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Morton v. Mancari, 417 U.S. 535 (1974) 12

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985) 7, 9, 12, 37, 40, 45

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 7, 17

Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Okla., 498 U.S. 505 (1991) 30

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 19, 36, 37

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 39

Rice v. Rehner, 463 U.S. 713 (1983) 37

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ... 15, 34

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 8, 33

Siegert v. Gilley, 500 U.S. 226 (1991) 42

Snooks v. Ninth Judicial District Court, 919 P.2d 1064 (Nev. 1996) 46

South Dakota v. Bourland, 508 U.S. 679 (1993) 21

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 5, 8, 18, 19, 21, 22

United States v. Mazurie, 419 U.S. 544 (1975) 15

United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992) 46

United States v. Tsosie, 92 F.3d 1037 (10th Cir. 1996) 46

United States v. Wheeler, 435 U.S. 313 (1978) .. 7, 14, 15, 45

TABLE OF AUTHORITIES – Continued

Page

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).....8, 33

Williams v. Lee, 358 U.S. 217 (1959)..... *passim*

Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985)..... 28

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).. *passim*

CONSTITUTIONS, STATUTES, AND LEGISLATIVE MATERIALS

Articles of Confederation, art. IX..... 32

U.S. Const. art. I, § 8, cl. 3 .....33, 35

U.S. Const. art. I, § 10..... 32

U.S. Const. art. II, § 2, cl. 2 32

25 U.S.C. § 179..... 45

25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, & 381..... 20

25 U.S.C. §§ 458aa-458gg 13

25 U.S.C. §§ 461-479..... 21

25 U.S.C. §§ 1301-1303..... 37

25 U.S.C. §§ 1301(2)-(4)..... 36

25 U.S.C. § 1302(2) 26

25 U.S.C. § 1302(8) 43

25 U.S.C. §§ 3601-3631..... 8, 37, 44

28 U.S.C. § 1332..... 45

28 U.S.C. § 1441..... 41

42 U.S.C. § 1983..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Act of Apr. 30, 1908, 35 Stat. 70, 85 1

S. Rep. No. 88, 103d Cong., 1st Sess. (1993) 38

Fallon Paiute-Shoshone Constitution 1

Fallon Paiute-Shoshone Law and Order Code, § 1-20-010 46

Fallon Paiute-Shoshone Law and Order Code, § 1-20-020 46

EXECUTIVE MATERIALS

Executive Order No. 13175, 65 Fed. Reg. 67, 249 (Nov. 6, 2000) 13

U.S. Department of the Interior, Bureau of Indian Affairs, Office of Trust Responsibilities, *Annual Report of Indian Lands* (Sept. 30, 1985) 1

TREATISES AND ARTICLES

Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 14, 20

Justice Sandra Day O'Connor, *Lessons From The Third Sovereign*, 33 Tulsa L.J. 1 (1997) 32

STATEMENT OF THE CASE

The lower federal courts in the instant case have upheld the jurisdiction of the Tribal Court of the Fallon Paiute-Shoshone Tribe (Tribe) over underlying actions based on tribal tort law and 42 U.S.C. § 1983.[1] The actions were brought by an enrolled tribal member, Floyd Hicks (Hicks), against non-Indian Game Wardens of the State of Nevada, Department of Wildlife (the Wardens), and the Wildlife Department's Director (Director), all in their individual capacities. It is undisputed that the alleged torts and violations took place entirely on Reservation Indian trust land "controlled by a tribe." Pet. at 24.

Hicks lives on his trust allotment within the Tribe's Reservation. He came under investigation by the Wardens in 1989 for the alleged unlawful possession or killing of a big horn sheep of the California subspecies, a gross misdemeanor under Nevada law. Pet. Br. at 3. Their suspicion of Hicks was based largely on information

---

[1] The Tribe is federally-recognized and exercises its sovereignty, including the operation of its Tribal Court, according to a federally-approved Constitution and Law and Order Code. The Tribe has about 918 members. The Tribe's Reservation, located in western central Nevada, consists of about 8,000 acres. At least since the Reservation was established, this land has been held continually by the United States in trust for the Tribe and for individual tribal members. *See* Act of Apr. 30, 1908, 35 Stat. 70, 85; *see also* U.S. Department of the Interior, Bureau of Indian Affairs, Office of Trust Responsibilities, *Annual Report of Indian Lands* 23 (Sept. 30, 1985). The Reservation has never been disestablished, diminished, or opened by act of Congress.

obtained in January of 1989 from a "Confidential Informant" that the sheep had been "freshly killed" in June of 1988. Pet. App. at E-1 – E-2.

On August 30, 1990, Warden Spencer executed an affidavit and applied for a State search warrant. Pet. App. at E-1 – E-2. The affidavit detailed observations of sheep heads protruding either from Hicks' vehicle, or vehicles located on his premises. *Id.* Based on those observations, Spencer sought a search warrant for Hicks' "premises and property." Pet. App. at E-2. A State Court issued a warrant that day for a search of the "premises." Pet. App. at G-1. The warrant contained the explicit caveat that, "[t]his Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute-Shoshone Tribes. . . . " *Id.*

The search warrant was presented to the Tribal Judge who affixed the following notation in part: "APPROVED and amended – applies to exterior premises only and to vehicles thereon. . . . " Pet. App. at G-1. Accompanied by a Tribal Police Officer, Spencer entered Hicks' trust allotment. After a search, Spencer seized a forty-year old, mounted sheep head of the Rocky Mountain subspecies from Hicks' vehicle. Pet. Br. at 3. The head was taken off the Reservation and later determined not to be evidence of any crime. It was returned to Hicks, but allegedly in damaged condition. *Id.*

Ten months later, on June 12, 1991, Spencer obtained another State search warrant to search for and seize the same alleged illegal "fresh kill." Pet. App. at F-2 – F-4.

The warrant was based in part on an affidavit averring that sheep heads were seen inside Hicks' residence. *Id.* at F-4. The Tribal Court approved this warrant without modification. *Id.* at F-1. The next day, accompanied by Tribal Police, Wardens Spencer, Ellington, and Fitzmorris entered Hicks' allotment. Pet. Br. at 3. A search of Hicks' residence lead to the seizure of a different forty-year old, mounted sheep head of the Rocky Mountain subspecies. *Id.* at 3. Again, the head was taken off the Reservation and determined not to be evidence of any crime. This head also was returned to Hicks, but allegedly in damaged condition. *Id.*

No charges against Hicks were ever brought by the State of Nevada, and the State has apparently ceased its investigation of him.

In July 1991, Hicks filed a civil action in Tribal Court for money damages for injuries allegedly sustained as a result of the conduct of State and Tribal officials on June 12-13, 1991.[2] Pet. App. H-1 – H-17. Named as defendants were, *inter alia*, the State of Nevada, the Director, and Wardens Spencer, Ellington, and Fitzmorris. *Id.* at H-1. The individual defendants were named in both their official and their individual capacities. *Id.* In June 1992, Hicks filed a second civil action in Tribal Court for money damages for injuries allegedly sustained as a result of the

---

[2] All claims by Hicks against the tribal officials ultimately were either voluntarily dismissed by Hicks or were resolved by the Tribal Court in favor of the tribal officials. *See* Decision and Order Denying All Relief As To Plaintiff's Second Amended Complaint at 4-5, *Hicks v. Harold*, Nos. CV-FT-91-034 and CV-FT-92-031 (Fallon Tribal Ct. May 18, 1992).

conduct on August 30, 1990 of, *inter alia*, Spencer in his official and individual capacity. J.A. at 8-21. Both actions alleged causes of action under tribal common law torts and violations of federal civil rights remediable pursuant to 42 U.S.C. § 1983. Pet. App. at I-4; J.A. at 8-21.

On May 5, 1993, the Tribal Court granted a Motion to Quash in these actions on the ground of ineffective service of process under tribal law. Pet. App. at L-1 – L-2. Hicks appealed to the Western Nevada Inter-Tribal Court of Appeals, of which the Tribe is a member. *See* J.A. at 2 & 3. On May 13, 1994, a three-judge panel of the Inter-Tribal Court of Appeals reversed the Tribal Court on the service of process issue and upheld tribal jurisdiction over the actions. Pet. App. at C-1 – C-8. The cases were remanded to the Tribal Court where they since have been stayed pending final federal court disposition of the question of tribal jurisdiction. *See* Pet. App. at B-4.

The Wardens and the Director, joined by the State of Nevada (collectively referred to as Petitioners) sought declaratory and injunctive relief in federal district court on the issue of tribal jurisdiction. Pet. Br. at 4; *see* J.A. at 4. They did not pursue claims of ineffective service of process in federal court. *See* Pet. App. at A-20 n.3 & B-5 – B-6. In addition to Hicks, Petitioners named as defendants the Tribal Court and the Associate Tribal Judge. Pet. App. at B-1. Hicks and the Tribe filed answers, with the Tribe attaching a limited waiver of sovereign immunity from suit. *See* Pet. App. at A-20 n.2 & B-4; *see also* J.A. at 4.

The case was presented to the federal district court on cross-motions for summary judgment. Pet. App. at

B-4; *see* J.A. at 4-5. Before district court disposition of the case occurred, Hicks successfully moved in Tribal Court to drop the State and all state parties in their official capacities as defendants to his actions there. J.A. 30-35; Pet. App. at A-5 & B-4. The district court then held that the dismissal mooted the issue of tribal court jurisdiction over these parties in those capacities. Pet. App. at B-18 n.3.

On October 1, 1996, Petitioners' summary judgment motion was denied and Hicks' and the Tribe's motions were granted. Pet. App. at B-1 – B-24; *see* J.A. at 5. The district court upheld tribal jurisdiction, finding, *inter alia*, that, even if the conditions for inherent tribal jurisdiction over the activities of non-Indians on land owned in fee by non-Indians which this Court announced in *Montana v. United States*, 450 U.S. 544 (1981) were required, the conditions had been met in this case. Pet. App. at B-12 – B-13. The district court also held that any question of qualified immunity did not present a jurisdictional issue, had not been exhausted in Tribal Court, and would not be reviewed. *Id.* at B-16 – B-17.

Petitioners appealed to the Court of Appeals for the Ninth Circuit. *See* J.A. at 6. On May 20, 1997, the three-judge panel requested supplemental briefing from the parties on the effect of this Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *See* Pet. App. at A-6; J.A. at 6. After oral argument on October 7, 1997, the panel withdrew the case from submission. *See* J.A. at 6-7; Pet. App. at A-1. The case was resubmitted on November 4, 1999. *See* J.A. at 7.

On November 9, 1999, a majority of the panel affirmed that there is tribal jurisdiction over Hicks' claims against the Wardens and the Director in their individual capacities. Pet. App. at A-1 – A-15. The panel majority found tribal authority to regulate the Wardens' conduct on trust land within the Reservation, and a corresponding power to adjudicate issues arising out of the conduct regulated. Pet. App. at A-6 – A-12. The panel majority also agreed with the district court that any non-jurisdictional immunity defenses had not been exhausted in tribal court and the district court was correct not to review them. *Id.* at A-12 – A-15.[3]

Judge Rymer dissented from the panel majority. Pet. App. at A-16 – A-19. She was of the view that *Montana's* conditions for tribal jurisdiction over the activities of non-Indians on non-Indian fee land were required in this case, and that the conditions had not been met. *Id.* at A-17 – A-19. The panel issued an amended opinion on January 24, 2000, largely to clarify that the panel majority did not intend to make any rulings on the merits of the alleged misconduct or liability in the underlying actions. *Id.* at A-1 – A-23; *see* J.A. at 7. Petitioners' petition for rehearing was denied and their suggestion for rehearing *en banc* was rejected on March 9, 2000. Pet. App. at D-1; *see* J.A. at 7.

---

[3] Petitioners grossly mischaracterize the Court of Appeals' opinion as being extremely broad and novel. Pet. Br. at 2. The opinion presents an issue of first impression, but the holding is limited, reasonable, and supportable, as this Brief will demonstrate.

SUMMARY OF ARGUMENT

Indian tribes are inherent sovereigns whose sovereignty pre-dates the Constitution. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542 (1832); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). They retain all sovereign powers which have not been taken away from them by the Federal Government. *United States v. Wheeler*, 435 U.S. 313 (1978); *Williams v. Lee*, 358 U.S. 217 (1959). This Court's decisions have consistently upheld tribal regulatory and adjudicatory jurisdiction over non-Indian conduct on Indian trust land. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981); *Williams v. Lee*, 358 U.S. 217 (1959). There is no reason to depart from that rule here.

Tribal jurisdiction exists even assuming *arguendo* that the requirement to meet the conditions for inherent tribal jurisdiction which this Court applied to non-Indian conduct on non-Indian fee land in *Montana v. United States*, 450 U.S. 544 (1981), applies to this Indian trust land case. These conditions are either a consensual relationship between the non-Indian and a Tribe or its members, or, non-Indian conduct which threatens or has some direct effect on the Tribe's political integrity, the economic security, or health and welfare. *Id.* at 565-566. Both conditions are met here. The Wardens sought permission from the Tribe to enter the Reservation in furtherance of a State interest in enforcing state law. The Tribal Court, exercising its supervisory authority, limited the scope of the permitted search. These reciprocal actions constituted the Wardens' consent to tribal regulation of their conduct and to tribal adjudication of any matters arising out of that

regulation. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (correlating tribal legislative with adjudicative jurisdiction). More importantly, however, the alleged deprivations of constitutional and tribal rights *by persons acting under color of state law* on trust land in this case constitute a significant threat to and direct effect on the Tribe. *Cf. Williams v. Lee*, 358 U.S. at 223; 42 U.S.C. § 1983.

State sovereign immunity from suit is not a consideration where, as here, suits are against officers in their individual capacities. *See Alden v. Maine*, 527 U.S. 706, 727 (1999); *Hafer v. Melo*, 502 U.S. 21, 25 (1991). There is no reason to change this rule merely because tribal courts are involved. The structure of the Constitution supports tribal court jurisdiction in this case. The Constitution vests in the Federal Government the exclusive right to manage Indian affairs. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996). Therefore, tribal sovereignty is "dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). Any divestment or diminishment of tribal sovereignty requires an act of Congress or a showing that the exercise of tribal sovereignty conflicts with "an overriding interest of the National Government." *Id.* at 153. Here, federal legislation and policy overwhelmingly support tribal courts as important forums within the federal system which have inherent jurisdiction over disputes arising within Indian land. *See, e.g.*, the Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631. The very presence of the United States as *amicus curiae* supporting tribal court jurisdiction is strong evidence of the favorable national policy.

As is the rule with respect to defenses to their jurisdiction, tribal courts should be allowed to determine in the first instance any applicable defenses of qualified or personal immunity. *See National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. at 856-857. The lower federal courts in this case were correct that the merits of any qualified immunity defenses have not been ruled on yet by the Tribal Court. Petitioners were therefore premature in seeking federal court review of qualified immunity defenses when they did.

Federal policy argues in favor of tribal court jurisdiction over actions under 42 U.S.C. § 1983. Section 1983 is a remedial statute which is properly construed broadly to achieve its purpose of protecting federal rights. *Dennis v. Higgins,* 498 U.S. 439, 445 (1991); *Monell v. New York City Dep't of Soc. Servs.,* 436 U.S. 658, 700 (1978). Tribal courts are courts of general jurisdiction, fully capable of deciding issues of federal law. *National Farmers,* 471 U.S. at 855-856. There is no indication that Congress intended to deprive tribal courts of jurisdiction over such actions and the proper inference from silence is that the power exists. *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987).

ARGUMENT

I. INTRODUCTION

The parties vary greatly in their views of what this case is about. Petitioners and their *Amici* States initially characterize it as presenting a Constitutional crisis involving State sovereignty. They insinuate that for an

Indian tribe to exercise jurisdiction over a *State is preposterous*. This hyperbole would be inappropriate even if the case did concern an exercise of sovereignty by a tribe over a state, but it does not.

The Tribe's view of this case differs dramatically from that of Petitioners. At issue here is the Tribe's basic right as an inherent sovereign to protect its members' federal and tribal rights within its territory and to provide a remedy when those rights are violated. The necessity for that sovereign authority is accentuated when the alleged offenders are acting "under color of state law." 42 U.S.C. § 1983. Congress has recognized in Section 1983 that individuals so acting pose a greater threat to citizens' rights than do individuals acting without the mantle of state power. Petitioners argue that the status of the Wardens as State employees militates against tribal court jurisdiction, while to the Tribe their status as State employees makes tribal jurisdiction over them in their individual capacities all the more important and justifiable.

The rhetoric of state sovereignty must not obscure an important practical perspective. At a basic level, this case is about whether a basis can be laid for mutual cooperation and respect. The case arose, after all, out of a real-life example of tribal/state cooperation. The Tribe accommodated the State's interest in enforcing state law against one of its own tribal members for an alleged crime occurring off the Tribe's Reservation. The State, for its part, respected tribal sovereignty in seeking tribal approval of its search warrants and having tribal officers accompany state officers to Hicks' residence on the Reservation. Both

sovereigns showed exemplary respect and cooperation, each one for the other.

Hicks alleges that during the investigations his rights were violated by both a Tribal Judge and tribal officers and the State and its officers. All were sued. There was no singling out of State officers. The cases against the State and the State officers in their official capacities have been dismissed and the cases against the Tribal Judge and tribal officers have been resolved. All that remains are the personal capacity suits against the Wardens and the Director. Petitioners chose to challenge tribal court jurisdiction in federal court before the Tribal Court considered any qualified immunity defenses. Because of the federal court action, the Tribal Court has not ruled on any qualified immunity defenses. It is not clear how it would rule if presented with those issues.

Two things are clear, however. First, the extreme rule of immunity from suit in "any capacity" called for by Petitioners is disrespectful of tribal sovereignty, implying second rate status and bias and incompetence of tribal institutions. That attitude has been disallowed by this Court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987). Second, a rule of absolute immunity will destroy the basis for future cooperation between States and Tribes in a wide variety of areas. That is not in anyone's long term interest. This case presents an opportunity to lay the framework for Tribes and States to cooperate if they choose. Once tribal courts demonstrate that they are fair and impartial, trust can develop. The approach suggested by Petitioners will never provide an opportunity for trust to develop. Fortunately, the law supports a basis for cooperation.

II. THE TRIBE HAS INHERENT JURISDICTION OVER THE ACTIONS PENDING IN TRIBAL COURT

Petitioners make two arguments based on principles of federal Indian law that the Tribe's sovereignty does not extend to the underlying actions in Tribal Court in this case. Pet. Br. at 36-44. Initially, they argue that this Court's rule articulated in *Montana v. United States*, 450 U.S. 544 (1981), that certain conditions must be met before inherent tribal jurisdiction will be upheld over the conduct of non-Indians on land owned in fee by non-Indians, should be extended to this case involving non-Indian conduct on Indian trust land. Pet. Br. at 36 & 39-44. Secondly, Petitioners argue that the conditions have not been met and thus there is no tribal jurisdiction here. *Id.* at 36-39. Both arguments must be rejected.

A. Tribes Have Inherent Jurisdiction Over Their Members And Their Territory

Indian tribes are independent sovereigns whose existence predated the coming of the Europeans to this country and hence the formation of the Union. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542 (1832); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). The European nations dealt with tribes as nations, primarily through treaties "formed as near as may be, on the model of treaties between the crowned heads of Europe." *Worcester*, 31 U.S. (6 Pet.) at 550. The Constitution recognized Tribes as sovereign entities with which the United States could enter into political relations. *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (Indian Commerce Clause

and the treaty power in art. II, § 2, cl. 2, provide the source of the Government's powers to deal with Indian affairs). Under the Constitution, the United States has negotiated hundreds of treaties and other inter-governmental agreements with Tribes. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* 107 (1982 ed.); *see also* 25 U.S.C. §§ 458aa-458gg (Tribal Self Governance Program expressly recognizes "the government-to-government relationship between the United States and Indian tribes," 25 U.S.C. § 458gg(c)); Exec. Order No. 13175, "Consultation and Coordination with Indian Tribal Governments," 65 Fed. Reg. 67, 249 (Nov. 6, 2000).

This Court likewise early-on confirmed the inherent sovereignty of tribes and the post-Constitutional status of that sovereignty. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), a tribe claimed status as a foreign state and sought to invoke the Court's original jurisdiction to enjoin a state from seizing the tribe's land. The Court easily accepted the tribe's status as a state. "So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful." 30 U.S. (5 Pet.) at 16. However, the Court was of the view that tribes were not foreign states so as to sustain the Court's jurisdiction. "They may, more correctly, perhaps, be denominated domestic dependent nations." *Id.* at 17.

In *Worcester*, one of the defenses recognized to the assertion of state jurisdiction over non-Indian missionaries on a tribe's reservation, was the sovereignty of the tribe. As the Court held,

> the settled doctrine of the law of nations, is that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.

31 U.S. (6 Pet.) at 560-561.

The inherent, pre and post-Constitutional nature of tribal sovereignty was perhaps best explained in a case where it was argued that tribal powers had been delegated by the United States. *United States v. Wheeler,* 435 U.S. 313 (1978). In *Wheeler,* the question was whether the double jeopardy clause of the Constitution barred the prosecution of an Indian under federal law. The defendant had previously been convicted in tribal court of a lesser-included offense arising out of the same incident. If tribes did not constitute a third sovereign within the United States, the Constitution would have barred a subsequent prosecution. The Court held that the double jeopardy clause did not bar the subsequent conviction since tribal sovereignty was inherent and did not owe its existence to the federal government.

> The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.' F. Cohen, *Handbook of Federal Indian Law* 122 (1945) (emphasis in original). . . . Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

435 U.S. at 322-323.

These foundational cases of the Court's federal Indian law jurisprudence – *Cherokee Nation, Worcester,* and its resolution of contemporary definitive issues such as that presented in *Wheeler* – continue to govern this Court's tribal sovereignty decisions. The general rule is that unless federal law provides otherwise, tribes have inherent jurisdiction over both their members and their territory, including the conduct of non-Indians within tribal territory. *United States v. Mazurie,* 419 U.S. 544, 557-558 (1975); *see also Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 139-140 (1982) (power to tax non-Indians is "one of the tools necessary to [tribal] self-government and territorial control"); *Iowa Mutual,* 480 U.S. at 14 ("tribes retain 'attributes of sovereignty over both their members and their territory,' to the extent that sovereignty has not been withdrawn by federal statute or treaty").

Tribal jurisdiction over non-Indians includes adjudicatory authority.[4] As the United States points out, "[c]entral to tribal sovereignty is proper respect for tribal courts. . . . " Br. of U.S. as Amicus Curiae at 1. In *Williams*

---

[4] "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. . . . " *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65-66 (1978).

Despite this recognition, Petitioners complain that litigation in tribal court is "difficult," due to their unfamiliarity with tribal law and procedures. Pet. Br. at 23. Petitioners ignore that Anglo-American courts have been allowed to develop over great periods of time. Tribal Courts have made great strides and will continue to do so with the support of Congress, this Court, and the Executive Branch of the Federal Government. *See* Br. of U.S. at 1-3.

v. Lee, 358 U.S. 217 (1959), the Court found exclusive tribal court jurisdiction over an action brought by a non-Indian to collect on a debt incurred by Indians on a reservation. The Court stated:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it.

358 U.S. at 223 (citations omitted). These basic federal law principles of tribal sovereignty govern the jurisdictional question in this case.

B. The Presumption of Inherent Tribal Jurisdiction Governs This Case Arising On Indian Trust Land

Since at least *Montana v. United States*, 450 U.S. 544 (1981), this Court has established two different tests for determining tribal jurisdiction over the conduct of non-Indians within tribal territory. On Indian trust lands – lands which are held by the federal government in trust for a tribe or for individual Indians – there is a presumption of tribal jurisdiction. On lands located within the exterior boundaries of tribal territory but which have passed out of trust and are held in fee simple by non-Indians, tribal inherent jurisdiction is not divested if certain conditions are met.

Montana involved, *inter alia*, an issue of tribal authority to regulate hunting and fishing by non-Indians within

a reservation. 450 U.S. at 548. The Court expressly differentiated between two types of land within the reservation: 1) land owned by the tribe or tribal members; and, 2) land owned in fee by non-Indians. *Id.* at 557. Consequently, the Court dealt separately with the issues of tribal powers over non-Indian conduct on each type of land. *Id.* at 557-566.

The Court agreed with the holding below regarding tribal jurisdiction on trust land.

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits.

450 U.S. at 557 (citation omitted).

Two terms later, in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the follow-up question to *Montana* arose: is tribal jurisdiction to regulate non-Indian hunting and fishing on Indian trust land exclusive of state jurisdiction. In holding that tribal jurisdiction was exclusive, this Court expressly affirmed the significance of the status of the land as Indian land.

> Our decision in *Montana v. United States, supra,* does not resolve this question [of whether the state may regulate hunting and fishing of non-Indians on Indian land where the Tribe is doing so]. Unlike this case, *Montana* concerned lands located within the reservation but *not* owned by

> the Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. But as to 'land belonging to the Tribe or held by the United States in trust for the Tribe,' we 'readily agree[d]' that a Tribe may 'prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establishing bag and creel limits.'

462 U.S. at 330-331 (alterations in original; citations and footnote omitted); *see also Merrion*, 455 U.S. at 139-140 (one term after *Montana*, upholding tribal taxation of non-Indian activities conducted on Indian land without reference to the *Montana* conditions).

Very recently, in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court again affirmed the importance of land status to questions of tribal jurisdiction. The Court found that the land in *Strate* – an easement for a state highway to cross over Indian trust land within a reservation that had been granted under a federal right-of-way statute – was the equivalent of non-Indian fee land. 520 U.S. at 454. The Court nevertheless expressly stated that, "[W]e 'can readily agree,' in accord with *Montana*, 450 U.S., at 557, that tribes retain considerable control over nonmember conduct on tribal land." 520 U.S. at 453.

The Court's most recent affirmance on this point is *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999). There, the Court held that Congress had made a clear preference for the adjudication of nuclear torts in federal court such that the normal rule providing for tribal exhaustion of questions of tribal court jurisdiction did not apply. 526 U.S. at 484-485. In the course of its opinion, the

Court responded to an argument that, in any event, tribal courts lack jurisdiction over such claims. The argument was based on a holding of *Strate v. A-1 Contractors*, that tribal courts have jurisdiction over non-Indian conduct only where tribes have regulatory jurisdiction over the matter at issue. Since, the argument in *Neztsosie* went, Congress had preempted the regulation of nuclear activity, tribal courts were without jurisdiction over the tort claims. The Court rejected that argument as follows:

> But *Strate* dealt with claims against nonmembers arising on state highways, and 'express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.' . . . By contrast, the events in question here occurred on tribal lands.

526 U.S. at 482 n.4.

These Indian trust land decisions must be compared with the non-Indian fee land portion of *Montana* where the Court required a showing of certain conditions for a tribe's inherent sovereignty to exist.

> But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. . . . The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians. . . . Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the

> inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.

450 U.S. at 564-65.

The reason for the distinction drawn by the Court between fee and trust land is clear in light of allotment acts – the federal statutes enacted primarily in the late 1880s and early 1900s. *See, e.g.*, the General Allotment Act, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, & 381. By these acts, Congress divided communal tribal land into individual parcels of land (allotments) for individual tribal members, and opened up other Indian land to private ownership by non-Indians. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* at 127-138. In *Montana* this Court concluded from its review of the legislative history of allotment that:

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. . . . It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

450 U.S. at 559 n.9.

Montana's holding regarding tribal jurisdiction over non-Indian conduct on non-Indian fee land thus relied

heavily on Congress' opening of Indian land to non-Indians and the settled expectations of non-Indians about living on land that they owned. The Court acknowledged that allotment and sale of surplus Indian lands were repudiated in 1934 by the Indian Reorganization Act, 25 U.S.C. §§ 461-479. The Court concluded however, that "what is relevant in this case is the effect of the land alienation occasioned by that [allotment] policy on Indian treaty rights tied to Indian use and occupation of reservation land." 450 U.S. at 559 n.9.

Subsequently, the Court has applied this reasoning to other cases involving congressional alienation of Indian land. *E.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989) (allotted land that had passed out of trust and into fee owned by non-Indians); *South Dakota v. Bourland,* 508 U.S. 679 (1993) (land taken and opened up for recreational use in connection with federal flood control and dam legislation); *Strate,* 520 U.S. at 454-456 (easement for highway granted pursuant to federal right of way statute).

The Court, however, has never done what Petitioners now ask it to do: require the conditions for tribal jurisdiction over non-Indian conduct on alienated land in a case arising on Indian trust land. *See* Pet. Br. at 39-43.[5] As

---

[5] Petitioners' *Amici* States accurately read *Montana* as requiring the conditions for inherent tribal sovereignty to be met only when the non-Indian conduct occurs on non-Indian fee lands. *Amici* States' Br. at 12. The United States also agrees that, based on land status, this Court has already drawn the "very jurisdictional distinction that petitioners seek to avoid." Br. of U.S. at 10.

recently as *Strate*, this Court confirmed that *Montana* establishes "a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non Indian land within a reservation, subject to two exceptions. . . . " 520 U.S. at 446. In contrast, this Court in *Strate* noted that *Montana* also establishes "that tribes retain considerable control over nonmember conduct on tribal land." *Id.* at 454.

There is no sound reason for accepting Petitioners' argument. The requisite basis for the *Montana* conditions – Congress' intent, land alienation, and the parties' expectations – are simply not present with respect to Indian trust land. Instead, Tribes reasonably expect to control non-Indian conduct on trust land. Non-Indians have no reasonable expectation of being free from tribal jurisdiction on that land. The Wardens had no such expectation, as they were properly advised by their own judiciary that the State has no jurisdiction on the Tribe's Reservation. Pet. App. at G-1.

C. Alternatively, Assuming *Arguendo* That The *Montana* Conditions For Tribal Jurisdiction Over Non-Indian Conduct On Non-Indian Fee Land Must Be Met In This Indian Trust Land Case, The Conditions Are Met Here

Assuming *arguendo* that the *Montana* conditions for tribal jurisdiction over non-Indian conduct on alienated land apply to this case arising on Indian trust land, there nevertheless is tribal jurisdiction here. *Montana* instructs that:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-566.

Thus, tribes have inherent jurisdiction over non-Indian conduct where either: 1) there is a "consensual relationship" between the non-Indian and a tribe or a member of the tribe; or, 2) a non-Indian's conduct threatens or directly affects a tribe's political integrity, economic security, or health and welfare. In this case, both conditions are met.

1. There was a Consensual Relationship between the Wardens and the Tribe because the Wardens Voluntarily Recognized the Tribe's Sovereign Authority, Processes, and Procedures, and the Tribal Court Exercised Supervisory Authority Over The Wardens' Conduct on the Reservation

Montana exemplifies consensual relationships as including "commercial dealing, contracts, leases, or other

arrangements." 450 U.S. at 565. Inherent in these examples and, indeed in the term "consensual" itself, is a voluntary act undertaken by one party with the mutual assent of the other party. *See, e.g., FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-1315 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) (upholding tribal regulation of employment practices of non-Indian mining company operating on non-Indian fee land within a reservation). Clearly there is voluntariness and mutuality in the present case. The State's own court admitted in the first search warrant that the State has no independent jurisdiction on the Reservation. Pet. App. at G-1. The Wardens concede that each time they entered the Reservation, they "obtained approval from Tribal Judge Rebecca Harold to execute the warrants on the reservation." Pet. Br. at 3. "Tribal police officers accompanied the wardens when they conducted the search." *Id.* The Tribal Court expressly limited the scope of the first warrant to the "exterior premises only and to vehicles thereon. . . . ," because the affidavit in support of the warrant indicated sightings of the sheep heads only in vehicles. Pet. App. at F-1 & E-1 – E-2.

The Wardens thus recognized and consented to the authority, processes, and procedures of the Tribe as a sovereign. In return, the Tribal Court, subject to its supervision, allowed the Wardens to enter the Tribe's territory for limited purposes. These voluntary and mutual undertakings between sovereigns are within the scope of the consensual relationships identified in *Montana*. Petitioners' suggestion that a consensual relationship must be

commercial is based on an overly strict reading of *Montana* and is unsound. Pet. Br. at 36-37. There is no principled reason for excluding sovereign-to-sovereign agreements from the consensual relationship condition.

2. The Wardens' Enforcement of State Law and Allegedly Actionable Behavior on the Reservation Threatens and Affects the Tribe

The Wardens here indisputably were attempting to enforce the State's criminal laws against a tribal member on the Reservation. Where a law enforcement officer acts within the territory of another sovereign, such action "directly implicates the sovereignty" of the other sovereign. *Biscoe v. Arlington County*, 738 F.2d 1352, 1358 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985). The same is true in the state-tribal setting. In *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970), a state tried to arrest an Indian on a reservation and extradite him pursuant to state law to another state where he was wanted. The Court of Appeals held that in light of the relationship between tribes and the United States,

> and the long history of the principle of retained tribal sovereignty. . . . Arizona's exercise of the claimed jurisdiction would clearly interfere with rights essential to the Navajo's self-government . . . . This conclusion does not frustrate the State of Arizona in carrying out [state law]. It simply recognizes that Arizona has no authority, and hence no duty, to exercise extradition jurisdiction over Indian residents of the Navajo Reservation.

413 F.2d at 685-686.

The federal district court in this case noted the Tribe's interest in the Wardens' activities.

> [T]ribal law provided very specific restrictions on the execution of extraterritorial search warrants on the reservation. These tribal law provisions. . . . clearly show that the tribe viewed the execution of state search warrants on the reservation as bearing directly on the political integrity of the tribe. By enacting such provisions, the tribe has asserted its interest in adjudicating such disputes.

Pet. App. at B-13 (citations omitted). Furthermore, the Tribal Court's limitation of the first warrant and supervision of both warrants follow the dictates of the Indian Civil Rights Act to respect "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures. . . . " 25 U.S.C. § 1302(2).[6]

Finally, Congress recognizes that persons acting under color of state law pose a more serious threat to a person's rights than do persons acting privately. 42 U.S.C. § 1983. That legislative insight is valid whether an action is brought under Section 1983 or tribal law. The status of the Wardens as employees of the State strengthens immeasurably the argument that their actions threaten and affect the political integrity of the Tribe. If tribes lack jurisdiction to hear their members' allegations that their

---

[6] Contrary to Petitioners' argument, Pet. Br. at 38-39 & 44, the Tribal Court did not cede the Tribe's "gatekeeping right" when it modified the warrant and maintained supervisory control over the Wardens' execution of the warrant. To supervise is the opposite of ceding.

federal and tribal rights have been violated by persons acting under color of state law, this would seriously "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S. at 223.

III. THE STATE'S SOVEREIGN IMMUNITY FROM SUIT IS NOT AN ISSUE IN THIS CASE BECAUSE THE STATE IS NOT A PARTY TO THE UNDERLYING ACTIONS IN TRIBAL COURT

A. The Actions In Tribal Court Are Individual Capacity Suits And Therefore Sovereign Immunity Is Not Implicated

At Hicks' instigation, the State and its officials in their official capacity were dismissed from the underlying actions in Tribal Court long ago. J.A. at 30-35. The remaining causes of action pending are against state officials in their individual capacities. In complete disregard of these facts, Petitioners and *Amici* States argue this case as though the State and its officials in their official capacity were still defendants before the Tribal Court. *E.g.*, Pet. Br. at 10-13 (complaining that the Tribe is seeking to "abrogate the State's sovereign immunity from suit"); *Amici* States' Br. at 24 (arguing that the Constitution left intact state sovereign immunity from suit, including suit in tribal court). This problem infects much of their Briefs and renders them largely beside the point. Unable to accept the nature of the underlying actions, Petitioners nevertheless argue that state sovereign immunity from

suit applies with full force to bar them. This position is untenable under pertinent law.[7]

The presence of public officials in individual capacity suits does not implicate sovereign immunity. As this Court explained in *Hafer v. Melo*, 502 U.S. 21 (1991),

> The Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983. . . .

502 U.S. at 31. This was also acknowledged in *Alden v. Maine*, 527 U.S. 706 (1999), a case generally supportive of state sovereign immunity, in which this Court nevertheless noted that:

> Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is not sought from the state treasury but from the officer personally.

527 U.S. at 757.

---

[7] Petitioners and their *Amici* point out that under Nevada law, the State will indemnify the individual officers. Pet. Br. at 9; *Amici* States' Br. at 28 n.4. That is a voluntary act on the State's part and does not extend its sovereign immunity to suits brought against its officers in their individual capacity. *Demery v. Kupperman*, 735 F.2d 1139, 1145 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985); *Wilson v. Beebe*, 770 F.2d 578, 588 (6th Cir. 1985); *Griess v. Colorado*, 841 F.2d 1042, 1045-46 (10th Cir. 1988); *Jackson v. Georgia Dep't of Transp.*, 16 F.3d 1573, 1577-78 (11th Cir. 1994), *cert. denied*, 513 U.S. 929 (1994); *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986); *Farid v. Smith*, 850 F.2d 917, 923 (2nd Cir. 1988).

These cases, particularly *Hafer v. Melo*, resolve virtually all of Petitioners' arguments in this area. In *Hafer*, suit was brought under 42 U.S.C. § 1983 against a state auditor general for alleged improper dismissal of state employees. Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

42 U.S.C. § 1983. The defendant in *Hafer* was sued in her individual capacity. She argued, similarly to Petitioners here, Pet. Br. at 20-22, that she fired the employees while acting in her official capacity and that Section 1983 liability turns not on the capacity in which state officials are sued, but on the capacity in which they acted when allegedly injuring a plaintiff. This Court rejected that argument.

> Through § 1983, Congress sought 'to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.' Accordingly, it authorized suits to redress deprivations of civil rights by persons acting 'under color of any [state] statute, ordinance, regulation, custom, or usage.' 42 U.S.C. § 1983. The requirement of action under color of state law means that Hafer may be liable for discharging respondents precisely because of her authority as auditor general. We cannot

> accept the novel proposition that this same official authority insulates Hafer from suit.

502 U.S. at 27-28 (citations omitted).

The defendant in *Hafer* also argued, as do Petitioners here, Pet. Br. at 7 & 20, that individual capacity suits are pleading technicalities to avoid state sovereign immunity.[8] Again, this Court disagreed.

> [T]he distinction between official-capacity suits and personal-capacity suits is more than 'a mere pleading device.' State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them. By contrast, officers sued in their personal capacity **come to court as individuals.**

502 U.S. at 27 (citations omitted; emphasis added).[9]

Under *Hafer*, it is precisely because the Wardens here were acting as state officials when the alleged deprivation of federal rights occurred that, if proven, makes them liable under Section 1983. Petitioners' argument that state sovereign immunity *per se* protects the Wardens flies in

---

[8] The rule allowing individual capacity suits is not an exception to the doctrine of sovereign immunity as Petitioners assert. Pet Br. at 20. *See* Br. of U.S. at 15; *Kentucky v. Graham*, 473 U.S. 159 (1985). Furthermore, the rule does vindicate federal rights while facilitating tribal control over their reservations.

[9] Petitioners argue that individual capacity suits against state officers are unfair because of lack of mutuality. Absent from Petitioners' Brief is any citation to this Court's references to individual capacity suits against tribal officials. *E.g.*, *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 514 (1991).

the face of *Hafer* and Congress' judgment as reflected in Section 1983.[10]

Officers in individual capacity suits may assert personal immunity defenses. *Hafer*, 502 U.S. at 31. In recognition of this holding, Hicks, the Tribal Respondents, the United States, and the lower federal courts are all of one mind that the Wardens are entitled to assert personal immunity defenses in the underlying actions here. *See, e.g.*, Br. of U.S. at 17 ("state officers sued in tribal court [in their individual capacities], whether under federal or tribal law, may assert . . . immunity defenses."). Petitioners have advanced no argument that justifies more than that simply because Indian interests are involved.

B. There Is No Reason For A Different Rule As To Individual Capacity Suits Because Tribal Court Jurisdiction Is At Issue

1. The Constitution Makes Tribal Sovereignty Subordinate only to the Federal Government, not the States, let alone State Officers in their Individual Capacities

Petitioners also argue that tribal jurisdiction may not lie in this case because the very structure of the Constitution and the dependent status of tribes under federal law prohibit tribal courts from exercising jurisdiction over state officers "in any capacity." Pet. Br. at 10; *see also,*

---

[10] Petitioners argue, Pet. Br. at 29, that tribal jurisdiction over state officials in their individual capacities leads to similiar jurisdiction over federal officials. The latter issue is not presented in this case. *But see* Br. of U.S. at 29 n.22.

Amici States' Br. at 6-7 & 10. Despite Petitioners' arguments to the contrary, *see, e.g.*, Pet. Br. at 15, traditional analysis has always relied heavily on the Constitution's recognition of three sovereigns and, as between the states and the federal government, the complete delegation of power over Indian affairs to the Federal Government.[11]

After the colonies achieved independence, "Congress assumed the management of Indian affairs; first in the name of these United Colonies, and afterward in the name of the United States." *Worcester*, 31 U.S. (6 Pet.) at 558. Article IX of the Articles of Confederation gave the "United States in Congress assembled the sole and exclusive right of 'regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided that the legislative power of any State within its own limits be not infringed or violated.' " *Id.* at 558-559. This inherently contradictory language was construed by some states to annul the power itself. *Id.* at 559. The problems created by the language of the Articles were resolved in the Constitution. The States ceded to the Federal Government the exclusive power to make treaties. *See* U.S. Const. art. I, § 10, and art. II, § 2, cl. 2,

---

[11] It is unclear what Petitioners mean by their statement that the Constitution's "bilateral structure permits no third berth for tribes." Pet. Br. at 15. If the statement means that tribes are not within the plan of convention, that is a commonplace. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). If it means that there are not three types of sovereign entities within the geographical borders of the United States, it is wrong as previous sections of this Brief have established. *See also* Justice Sandra Day O'Connor, *Lessons From The Third Sovereign*, 33 Tulsa L.J. 1 (1997) ("There are three sovereigns in our country – the states, Federal Government, and the Tribes.")

and the power to "regulate Commerce . . . with the Indian Tribes," *Id.* at art. I, § 8, cl. 3. *See also Worcester* 31 U.S. (6 Pet.) at 561; *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) (stating that federal authority over Indian affairs derives from commerce and treaty provisions).

The net result is that under the Constitution, exclusive power to govern Indian affairs resides in the Congress. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996). Petitioners concede that the Indian Commerce Clause establishes that Indian relations are the exclusive province of federal law, and that "[t]he Commerce Clause . . . establishes federal authority over commerce with the Indians." Pet. Br. at 11 & 14; *see also Amici* States' Br. at 7 & 21. As this Court has made clear, this Constitutional structure makes tribal sovereignty subordinate only to the federal government, not to the states. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) (irrelevant that a tribe's taxing scheme might implicate state sovereignty, since tribal sovereignty is subordinate only to the Federal Government).

Nothing about this structure prohibits tribal courts from exercising jurisdiction in cases such as the underlying actions. As the United States points out,

> Petitioners cannot point to any Treaty or Act of Congress divesting Tribes generally, or the Fallon Paiute-Shoshone Tribe specifically, of all power to adjudicate claims against state officers in their personal capacities . . . [Petitioners' argument is] based on principles of sovereign

> and qualified immunity. Petitioners are mistaken.

Br. of U.S. at 15.

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), relied on by Petitioners for their "not in any capacity" argument, has no relevance to this case. *See* Pet. Br. at 11-13. *Blatchford* presented the narrow question of whether a tribe was barred by the Eleventh Amendment from suing a state in federal court. In answering that question in the affirmative, the Court relied primarily on its holding in *Monaco v. Mississippi*, 292 U.S. 313 (1934), that the Eleventh Amendment barred a foreign sovereign from suing a State. Since tribes, like foreign states, were strangers to the constitutional convention, the Court in *Blatchford* held that they could not sue States in federal court either. 501 U.S. at 781. But *Blatchford* did not involve suits against officials in their individual capacities, and its holding comfortably coexists with the principle that such suits are allowed, even in tribal court, because they do not implicate sovereign immunity.

2. Notwithstanding The Few Instances of Implicit Divestment This Court Has Found, It Is Not Called For Here Where Federal Law and Policy Support Jurisdiction

Williams v. Lee indicated that if Tribes are to lose an aspect of their inherent sovereignty, it is generally for Congress to take it away because of some overriding federal interest. 358 U.S. at 223; *see also Santa Clara Pueblo v. Martinez*, 436 U.S. at 60 ("a proper respect both for tribal sovereignty itself and for the plenary authority of

Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."). It is, after all, Congress which is given the exclusive authority to regulate commerce with the Indian tribes. U.S. Const., art. I, § 8, cl. 3.

Nevertheless, on rare occasions this Court has found a power of tribes to be "generally and implicitly" divested as a result of their dependent status. The Court has acted cautiously in this area, noting the general rule that "Tribal powers are not implicitly divested by virtue of the tribes' dependent status." *Colville*, 447 U.S. at 153. The Court has found an implicit divestiture only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. . . . " *Id.* Those instances have been remarkably few. Even in those instances, there have been important expressions of federal policy. The Court did not write on a clean slate.

In the early days of this nation, this Court held in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), that Indians could not alienate their lands to non-Indians without federal consent. This rule had been established by the European powers before formation of the Union and was held to have been absorbed into the law of the United States. A few years later, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 15-17, the Court held that an Indian tribe could not engage in foreign relations. This result stemmed from the treaty involved in which the tribe, as with tribes generally, had placed itself under the authority of the United States. Both of these activities by

a tribe would have seriously conflicted with clearly delineated, overriding federal interests. After these two decisions, the doctrine of implicit divestment lay dormant for nearly one hundred and fifty years.

The Court resurrected the doctrine of implicit divestment in the criminal law area. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), involved a tribe's assertion of criminal jurisdiction over a non-Indian. While no federal statute spoke directly to this issue, a record of legislation contained strong indications of congressional and Executive views on the subject. This history of federal legislation concerning federal jurisdiction over non-Indian criminal activity within reservations, lead this Court to conclude that, "while Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions." 435 U.S. at 204. This implicit congressional intent coupled with a concern for the personal liberty and rights of United States citizens, caused the Court to hold that tribes had been implicitly divested of criminal jurisdiction over non-Indians. *Id.* at 210.[12]

As has been discussed, tribal civil jurisdiction over non-Indians has been implicitly divested to a far lesser

---

[12] This holding was extended in *Duro v. Reina*, 495 U.S. 676 (1990), to prohibit tribes from trying and punishing Indians who are members of another tribe. *Duro* has since been overturned by Congress to clarify that tribes may exercise some criminal jurisdiction over members of other tribes. 25 U.S.C. §§ 1301(2)-(4).

extent. *Montana*, 450 U.S. at 565-566; *National Farmers*, 471 U.S. at 854 (expressly declining to extend *Oliphant* to the civil area).[13] But as discussed, even under *Montana* there is tribal jurisdiction in the present case, especially since the Wardens were acting under color of state law.[14]

Furthermore, the existence and exercise of tribal jurisdiction here furthers important federal interests. Regarding the Section 1983 claims, tribal court jurisdiction helps enforce a federal remedial statute. Regarding the tribal law claims, tribal court jurisdiction is in harmony with Congress' support for the development and acknowledgment of the inherent authority of tribal courts. *See, e.g.*, The Indian Tribal Justice Act, 25 U.S.C. §§ 3601(4)-3601(6) (tribes possess "inherent authority to

---

[13] In addition, the Court has referred to implicit divestment in the special area of regulation of liquor sales in Indian country, an area in which Congress has had a comprehensive role since the beginning of this Nation. *Rice v. Rehner*, 463 U.S. 713, 724-26 (1983).

[14] That the Court's treatment of tribal civil jurisdiction differs vastly from its treatment of tribal criminal jurisdiction is well-acknowledged. *See Iowa Mutual*, 480 U.S. at 15 ("Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted"); *Duro*, 495 U.S. at 687-688 ("The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction").

Congress has likewise placed greater restrictions on tribal authority in criminal cases than in civil cases. The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, limits the criminal penalties that tribes can impose for violations of that Act, but it does not similarly regulate the civil remedies which tribes may make available for violations of the Act.

establish their own form of government, including tribal justice systems . . . " [and tribal courts are] "important forums for ensuring public health and safety and the political integrity of tribal governments" [and the] "appropriate for ms for the adjudication of disputes affecting personal and property rights"). The Senate Report accompanying the Act acknowledged that "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). *See also* Br. of the U.S. at 2-3 (discussing congressional support for tribal courts).

Finally, the presence of the United States before this Court in this case, urging affirmance of the decision below, indicates clearly that allowing individual capacity suits against state officers in tribal court is in harmony with federal policy.

In short, this case is not one calling for implicit divestment of tribal jurisdiction. To the contrary, federal law and policy converge to support, indeed to require, tribal court jurisdiction so as not to undermine the tribal right of self-government. *Williams v. Lee*, 358 U.S. at 223.

IV. THE RULINGS BY THE COURT OF APPEALS REGARDING ADJUDICATION OF THE AFFIRMATIVE DEFENSES ARE CONSISTENT WITH THIS COURT'S DECISIONS IN THE AREA OF JUDICIAL CIVIL PROCEDURE AND THE TRIBAL EXHAUSTION RULE

A. It Is Firmly Established That Affirmative Defenses Are Non-Jurisdictional

In Part II of their Brief (pp. 29-35) Petitioners again ignore that the actions in Tribal Court are against the

Wardens in their individual capacities. Instead, Petitioners rely exclusively on cases establishing that, when states are sued or state officers are sued in their official capacity, or, when tribes are sued or tribal officers are sued in their official capacity, the sovereign immunity defense is treated basically as jurisdictional.[15] These cases are not applicable here. Assertions of qualified immunity are not jurisdictional, they are personal affirmative defenses. *Hafer v. Melo*, 503 U.S. at 28; *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) ("Qualified immunity . . . is an affirmative defense that must be pleaded by a defendant official."); *see also Jefferson County v. Acker*, 527 U.S. 423, 447 (1999) (Scalia, J., dissenting) (suggesting that it would be "an odd result" to subsume the merits of the defense of qualified immunity within the "threshold jurisdictional question"); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (while qualified immunity is an available defense, it is not relevant to the existence of a cause of action).

---

[15] Petitioners cite a plethora of cases, which all stand for the same proposition. Regarding state immunity, *see, e.g., Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). Regarding tribal immunity, *see, e.g., Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998). There is perfect symmetry in the treatment of state and tribal immunity as jurisdictional defenses, when the sovereigns are sued or when the officers of either sovereign are sued in their official capacities.

B. The Affirmative Defenses Have Not Been Exhausted In This Case Because The Tribal Court Has Not Yet Ruled On The Merits Of Any Such Defenses

The lower federal courts correctly ruled that the Wardens' personal immunity defenses, if any, are subject to this Court's exhaustion of tribal remedies rule. *See also* Br. of U.S. at 17 ("We agree with the courts below that the prudential tribal court exhaustion rule of *National Farmers* and *Iowa Mutual* ordinarily should apply to those federal immunity defenses as they do to federal jurisdictional defenses.").[16] Petitioners complain that they submitted a sovereign immunity defense and qualified immunity defenses to the Tribal Court at the same time, and that the Tribal Court rejected both defenses. *See* Pet. Br. at 4-5 & 31-33. Both lower federal courts, however, held that the qualified immunity defenses were not decided on the merits. They understood that Petitioners invoked the doctrines of "sovereign immunity" and "qualified immunity" only in support of their contention that the Tribal Court lacked personal jurisdiction over them. Pet. App. at A-13. The lower federal courts thus quite correctly concluded that the Tribal Court merely held that no immunity defenses precluded tribal court jurisdiction in the first instance. Pet. App. A-12 – A-13.

---

[16] Petitioners desire that there be no "role for tribal courts" in the federal system into which, in Petitioners' view, "tribes do not fit." Pet. Br. at 15 & 16. Of course, this Court's cases such as *Williams v. Lee; National Farmers*; and, *Iowa Mutual* have already placed tribal courts within the federal system. What is most important, then, is to ensure that they are well-placed.

Had Petitioners not immediately sought federal court review of the jurisdictional issue, however, the Tribal Court likely would have proceeded to address any applicable qualified immunity defenses. This procedure is required by the principle that the doctrine of qualified immunity constitutes an immunity from suit, not merely a defense to liability, and that the doctrine is undermined if an action is allowed to go to trial or even to have extensive pretrial proceedings. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Tribal Court actions have not run afoul of these rules as there have to date been no discovery proceedings or trial proceedings. *See also* Br. of U.S. at 22-23 (personal immunity defenses are subject to exhaustion in tribal court as long as they can "be fully adjudicated in advance of trial. . . . [and] such pretrial matters as discovery. . . . ").[17]

---

[17] The United States suggests that, given the presence of federal claims in the underlying actions, the Wardens should have an absolute right of removal to federal court, analogous to that in 28 U.S.C. § 1441. Br. of U.S. at 24-30. This suggestion of a wholesale and implied application of Section 1441 to cases in tribal courts should be rejected as overbroad, unnecessary, and contrary to the congressional policy of the development of tribal courts. For example, Section 1441 is available to any "defendant" and thus would allow removal by private non-Indian parties and even by tribal members. The term "federal question" is broad and covers much of what tribal courts handle in terms of federal Indian law statutes, principles of federal Indian law, and tribal treaties. Congress, not this Court, should determine whether tribal courts may not hear these cases.

Moreover, for the United States to characterize its suggestion as putting tribal and state courts on a par is disingenuous. Br. of U.S. at 28. Tribal courts are already at a severe disadvantage in relation to state courts. To deprive them

The lower federal courts properly understood that in this case, assuming that jurisdiction is upheld, the earliest possible adjudication of the merits of the affirmative defenses will occur after final disposition of the jurisdictional issue. While the Tribal Appellate Court instructed the tribal court to "set a trial date," Pet. Br. at 5; Pet. App. at C-5, the Court of Appeals, Pet. App. at A-12 – A-15, undoubtedly meant for the Tribal Court to follow this Court's cases and engage in the affirmative defense adjudication before trial or extensive discovery, to ensure that the Wardens are not subjected to "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

While rulings on qualified immunity should take place at the earliest possible time, it is also true that qualified immunity defenses often have a factual element. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Mitchell v. Forsyth*, 472 U.S. at 526. It is that factual context which was never developed in the Tribal Court. As the federal district court noted:

> Although plaintiffs argue that the tribal court 'implicitly' ruled on the defense, the court disagrees. The tribal court did not hold an evidentiary hearing or make definitive findings of fact or conclusions of law on the application of the

---

of even more jurisdiction *in the absence of clear congressional intent* threatens to seriously undermine their efficacy. The present system of exhaustion of tribal remedies gives due respect to tribal sovereignty and provides ample opportunity for federal court review. It strikes a healthy balance among the competing interests at stake and should be adhered to by this Court.

> qualified immunity defense to the facts of this case. The court held only that qualified immunity was not a jurisdictional bar to tribal court jurisdiction in the first instance.

Pet. App. at B-16.

If this Court sustains tribal jurisdiction, the first order of business on remand would be to consider the merits of any asserted qualified immunity defenses. Such a procedure is in harmony with what is called for by the Court's decisions.[18]

---

[18] The United States posits that, while all personal immunity defenses are subject to exhaustion in tribal court, substantive federal law should govern the scope of any qualified immunity defense, whether asserted in response to a claim under federal law or tribal law. Br. of U.S. at 18-21. This issue is not before the Court in this case. It is clear, however, that federal law will govern all aspects of the Section 1983 claims. *Howlett v. Rose*, 496 U.S. 356, 375 (1990) ("The elements of, and the defenses to, a federal cause of action are defined by federal law.").

Regarding the tribal law claims, the United States' suggestion that reciprocal federal law defenses for state and tribal officials sued in their individual capacities in each others' courts, provides a justifiable basis for future cooperation and certainty. Br. of U.S. at 18.

V. AS COURTS OF GENERAL JURISDICTION COMPETENT TO APPLY FEDERAL LAW, TRIBAL COURTS HAVE JURISDICTION OVER ACTIONS UNDER 42 U.S.C. § 1983

Petitioners argue incorrectly that tribal courts lack jurisdiction over actions brought pursuant to 42 U.S.C. § 1983. Petitioners initially argue that any waiver of state sovereign immunity must be clearly expressed and that Congress lacks authority to effectuate such a waiver of the states' immunity. Pet. Br. at 24.[19] But no one is claiming a waiver of sovereign immunity under Section 1983.[20] *See Hafer v. Melo*, 502 U.S. at 30 ("Congress did not intend to override state sovereign immunity when it enacted § 1983 . . . "). The State is not a party here, nor are its officials in their official capacity.

---

[19] 42 U.S.C. § 1983 was passed pursuant to the Fourteenth Amendment and there is congressional authority to pierce a State's sovereign immunity under that authority if that were relevant here. *Monell v. New York City Dep't of Soc. Serv.*, 436 U.S. at 700-701; *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

[20] One of the oft-repeated points that Petitioners make in support of this argument is that tribal courts historically "did not exist," or at least were unknown to non-Indians when Section 1983 was originally enacted in 1871. Pet. Br. at 7-8, 13-14, & 24-26. This point ignores "traditional tribal justice practices. . . . " which Congress has expressly recognized. The Indian Tribal Justice Act of 1993, 25 U.S.C. § 3631(4). It also ignores a fundamental rule of federal Indian law that tribes do not lose their sovereign powers by non-use. *See, e.g., Merrion*, 455 U.S. at 148 ("Without regard to its source, sovereign power, even when unexercised, is an enduring presence that. . . . will remain intact unless surrendered in unmistakable terms.").

Petitioners also argue that Congress has not expressly authorized tribal court jurisdiction over Section 1983 actions. Pet. Br. at 7; 24-26. As discussed above, this argument distorts the applicable rule. Inherent tribal sovereignty does not depend on a delegation of federal power. *Wheeler*, 435 U.S. at 328. Rather, the burden is on the party challenging inherent tribal sovereignty to show that Congress has expressly divested it. In *Iowa Mutual*, this Court rejected an argument that the federal diversity jurisdiction statute, 28 U.S.C. § 1332, implicitly divested a tribe's authority to adjudicate a civil tort case arising on a reservation and involving a non-Indian defendant.

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. 'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'

480 U.S. at 18.

Moreover, despite the *Amici* States' argument to the contrary, *Amici* States' Br. at 6 & 16, it is established that "tribal courts, like state courts, can and do decide questions of federal law." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. at 486 n.7. That is a fundamental basis of the exhaustion rule. *National Farmers*, 471 U.S. at 852; *Iowa Mutual*, 480 U.S. at 16-18; *see also United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992) (holding that tribal court has jurisdiction over action under federal statute, 25 U.S.C.

§ 179, which provides penalties for trespass by livestock to tribal land); *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996); *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986), *cert. denied*, 476 U.S. 1117 (1986) (requiring exhaustion in tribal court of claims of conspiracy to deprive of civil rights); *see also* Br. of U.S. at 3 ("Congress has recognized tribal courts' jurisdiction to adjudicate important questions of federal law.").

Section 1983 is broadly remedial and must be so construed to effectuate its purpose of safeguarding federal rights. *Dennis v. Higgins*, 498 U.S. 439, 445 (1991); *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 700 (1978). Tribal courts are courts of general jurisdiction and if they decide to entertain such suits, they should be encouraged to do so.[21] *Cf. Howlett v. Rose*, 496 U.S. at 356 (state courts are required to entertain such actions if they are filed in a court of competent jurisdiction).[22] There is

---

[21] The Tribe's Code provides that the jurisdiction of the tribal court "shall extend to all territory within the present exterior boundaries of the Colony . . . including trust and non-trust land. . . . " Law and Order Code, § 1-20-010. The Civil Jurisdiction extends to "all civil causes of action, over persons, or things, arising or existing within the territorial jurisdiction of the court." *Id.* at 1-20-020.

[22] The arguable presence of alternative forums, *see Amici* States' Br. at 7, clearly does not preclude the existence of tribal jurisdiction. *See Williams v. Lee*, 358 U.S. at 222-223. Furthermore, it is an open question whether non-tribal forums could take jurisdiction over all of the claims present in the underlying actions. *See Snooks v. Ninth Judicial Dist. Court*, 919 P.2d 1064 (Nev. 1996) (state courts lack jurisdiction over on-reservation suit against tribal member). Assuming that they could not counsels in favor of tribal jurisdiction. Even assuming *arguendo* that there is concurrent jurisdiction, the fact that the

nothing in Section 1983 giving state courts jurisdiction, but their exercise of jurisdiction comports with the statute's remedial nature. This is no less true for tribal courts.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

KIM JEROME GOTTSCHALK
Counsel of Record
MELODY L. MCCOY
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760
Counsel for Respondents
the Tribal Court and the
Honorable Joseph Van Walraven

---

conduct and events most relevant to the underlying actions occurred within tribal territory, and that pertinent evidence and witnesses are likely to be there as well, makes tribal court the more appropriate forum.

JAN 19 2001

No. 99-1994

Supreme Court, U.S.
FILED
JAN 19 2001
CLERK

IN THE

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,
Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,
Respondents.

On Writ of Certiori to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT FLOYD HICKS

Of Counsel:
JULIE ANN FISHEL
WINTHROP & WEINSTINE, P.A.
30 E. Seventh Street
St. Paul, MN 55101
(651) 290-8458

JENNIFER K. HARVEY
HOLLAND & HART LLP
555 Seventeenth Street
Denver, CO 80202
(303) 295-8244

S. JAMES ANAYA
Counsel of Record
ROBERT A. WILLIAMS, JR.
INDIGENOUS PEOPLES LAW AND POLICY PROGRAM
THE UNIVERSITY OF ARIZONA
JAMES E. ROGERS COLLEGE OF LAW
1201 E. Speedway
Tucson, AZ 85721-0176
(520) 626-6341

Counsel for Respondent Floyd Hicks

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a tribal court has jurisdiction over civil suits brought by a tribal member against state officials in their individual capacities, where the suits are for alleged illegal and tortious conduct by the officials against the tribal member on his trust allotment land within his reservation.

2. Whether immunity defenses that may be available to state officials, who have been sued in tribal court in their individual capacities, should be adjudicated by the tribal court prior to any federal court intervention.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. THE FALLON TRIBAL COURT HAS JURISDICTION OVER THE SUITS FILED BY MR. HICKS AGAINST STATE OFFICIALS IN THEIR INDIVIDUAL CAPACITIES FOR THEIR ALLEGED WRONGFUL ACTS ON TRUST LAND WITHIN THE RESERVATION	8
A. The Lack of Tribal Membership of the Parties Sued by Mr. Hicks Does Not Deprive the Tribal Court of Jurisdiction as a Matter of Federal Law	10
B. The Petitioners' Claim of State Sovereign Immunity Does Not Bar Tribal Court Jurisdiction Over Mr. Hicks' Suits Against State Officials in Their Individual Capacities	14
1. Suits to Recover Money Damages from State Officials Personally, Such as the Suits Brought by Mr. Hicks, are Not Jurisdictionally Barred by State Sovereign Immunity	15

TABLE OF CONTENTS—Continued

Page

2. *Federal Law Does Not Impose on Tribal Courts a Special Jurisdictional Rule of Blanket Immunity for State Officials* 21

a. The Constitution does not extend state sovereign immunity to bar tribal court jurisdiction over state officials sued in their individual capacities..... 22

b. This Court's federalism jurisprudence is inconsistent with a rule of extraordinary state official immunity exclusive to tribal courts..... 24

C. The Argument that this Case Should Establish an Additional Divestiture of Tribal Jurisdiction Rests on an Historically and Doctrinally Inaccurate View of the Effects of the European Discovery of Indian Lands, a View which Cannot be Sustained Under Modern Principles of Racial Equality..... 31

1. *Because of the Problematic Aspects of the Doctrine of Discovery, this Court was Careful to Limit its Reach Such that the Doctrine Should Have No Application Here*..... 33

2. *The Court's Decision in Oliphant Does Not Provide a Basis for This Court to Establish an Additional Inherent Limitation on Tribal Authority on Indian-Owned Land*..... 38

TABLE OF CONTENTS—Continued

Page

D. Needed Cooperation Between States and Tribes, Including in Matters of Law Enforcement, Would be Undermined by a Rule Preventing the Exercise of Tribal Court Jurisdiction Over State Officials 43

II. INDIVIDUAL IMMUNITY CLAIMS RAISED BY THE STATE OFFICIALS SHOULD FIRST BE ADJUDICATED IN TRIBAL COURT 46

CONCLUSION 50

TABLE OF AUTHORITIES

Page

Cases:

A&A Concrete, Inc. v. White Mountain Apache Tribe,
781 F.2d 1411 (9th Cir. 1986) 49

Alden v. Maine,
527 U.S. 706 (1999) 7, 22, 23, 29

Arizona v. Turtle,
413 F.2d 683 (9th Cir. 1969) 25

Bad Frog Brewery, Inc. v. New York State Liquor Auth.,
134 F.3d 87 (2d Cir. 1998) 19

Bassett v. Mashantucket Pequot Tribe,
204 F.3d 343 (2d Cir. 2000) 20

Blatchford v. Native Village of Noatak,
501 U.S. 775 (1991) ..... *passim*

Blaylock v. Schwinden,
862 F.2d 1352 (9th Cir. 1988) 16

Boisclair v. Superior Co.,
801 P.2d 305 (Cal. 1990) 1

Boisclair v. Imperial Granite Company,
51 Cal. 3d 1140 (Cal. 1990) 20

Brady v. Roosevelt S.S. Co.,
317 U.S. 575 (1943) 15

Brendale v. Confederated Tribes,
492 U.S. 408 (1989) 41

Burnham v. Pequot Pharm. Network,
No. CV95536264, 1998 WL 345463
(Conn. Super. Ct. June 19, 1998) 20

Cherokee Nation v. Georgia,
30 U.S. (5 Pet.) 1 (1831) 35

Darul-Islam v. Dubois,
997 F. Supp. 176 (D. Mass. 1998) 17

Drumm v. Brown,
No. CV960079971, 2000 WL 73277
(Conn. Super. Ct. Jan. 10, 2000) 20

Cases—Continued: Page

Duckworth v. Franzen,
780 F.2d 645 (7th Cir. 1985) 17
Dugan v. Rank,
372 U.S. 609 (1963) 16
Edelman v. Jordan,
415 U.S. 615 (1974) 16
El Paso Natural Gas Co. v. Neztsosie,
526 U.S. 473 (1999) 18, 48
Ex parte Crow Dog,
109 U.S. 556 (1883) 12
Ex parte Young,
209 U.S. 123 (1908) 16
Ford Motor Co. v. Department of Treasury,
323 U.S. 459 (1945) 15, 19
Forrester v. White,
484 U.S. 219 (1988) 17
Gayle v. Little Six, Inc.,
No. C5-99-430, 2000 WL 16320
(Minn. Ct. App. Jan. 11, 2000) 20
Hafer v. Melo,
502 U.S. 21 (1991) ..... *passim*
Hanson v. Denckla,
357 U.S. 235 (1958) 13
Harlow v. Fitzgerald,
457 U.S. 800 (1982) 19
Hegner v. Dietze,
524 N.W.2d 731 (Minn. Ct. App. 1994) 20
Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997) 22, 29
Imbler v. Pachtman,
424 U.S. 409 (1976) 20
Iowa Mut. Ins. Co. v. LaPlante,
480 U.S. 9 (1987) 8, 10, 48

Cases—Continued: Page

Johnson & Graham's Lessee v. M'Intosh,
21 U.S. (8 Wheat.) 543 (1823) ..... *passim*
Kerr-McGee v. Farley,
115 F.3d 1498 (10th Cir. 1997) 49
Kimel v. Florida Bd. of Regents,
528 U.S. 62 (2000) 22
Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.,
523 U.S. 751 (1998) 27
Landmark Golf, Ltd. v. Las Vegas Paiute Tribe,
49 F. Supp. 2d 1169 (D. Nev. 1999) 18, 48
Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949) ..... *passim*
Mabo v. Queensland
(1992) 107 A.L.R. 1 (Austl.) 32, 33, 34
MacFarland v. Oakland County,
869 F.2d 1491 (6th Cir. 1989) 16
McClanahan v. Arizona State Tax Comm'n,
411 U.S. 164 (1973) 25
Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982) 13
Middlemist v. Secretary of Interior,
824 F. Supp. 940 (D. Mont. 1993) 19
Montana v. Gilham,
133 F.3d 1133 (9th Cir. 1998) 23, 28
Montana v. Gilham,
932 F. Supp. 1215 (D. Nev. 1996) 28
Montana v. United States,
450 U.S. 544 (1980) ..... *passim*
National Farmers Union Ins. Cos. v. Crow Tribe,
471 U.S. 845 (1985) 48
Nevada v. Hall,
440 U.S. 410 (1979) ..... *passim*
Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21 (1st Cir. 2000) 49

Cases—Continued: Page

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) 20
Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993) 11
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 38, 39, 41
Ortega v. Reyna, 953 P.2d 18 (Nev. 1998) 1
Peña v. Gardner, 976 F.2d 469 (9th Cir. 1992) 19
Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 16, 19, 22, 29
Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 24
Quern v. Jordan, 440 U.S. 332 (1979) 18
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 6, 18, 22
Scheuer v. Rhodes, 416 U.S. 232 (1974) 15
Seminole Tribe v. Florida, 517 U.S. 44 (1996) 22, 29
Smith v. Moffett, 947 F.2d 442 (10th Cir. 1992) 49
Snooks v. Ninth Judicial Dist. Court, 919 P.2d 1064 (Nev. 1996) 26
South Dakota v. Bourland, 508 U.S. 679 (1993) 41, 42
Stock West Corp. v Taylor, 964 F.2d 912 (9th Cir. 1992) 47
Strate v. A-1 Contractors, 520 U.S. 438 (1997) 5, 10, 41
Talton v. Mayes, 163 U.S. 376 (1896) 30

Cases—Continued: Page

Texaco, Inc. v. Zah,
5 F.3d 1374 (10th Cir. 1993) 48
The Schooner Exchange v. McFaddon,
11 U.S. (7 Cranch) 116 (1812) 26
Turner v. Martire,
82 Cal. App. 4th 1042 (Cal. Ct. App. 2000) 20
United States v. Anderson,
857 F. Supp. 52 (D.S.D. 1994) 12
United States v. Kagama,
118 U.S. 375 (1886) 43
United States v. Plainbull,
957 F.2d 724 (9th Cir. 1992) 48, 49
White Mountain Apache Indian Tribe v. Shelley,
480 P.2d 654 (Ariz. 1971) 20, 21
Will v. Michigan Dep't of State Police,
491 U.S. 58 (1989) 16, 18
Williams v. Lee,
358 U.S. 217 (1959) 14
Wilson v. Beebe,
770 F.2d 578 (6th Cir. 1985) 16
Wilson v. UT Health Ctr.,
973 F.2d 1263 (5th Cir. 1992) 19
Wood v. Strickland,
421 U.S. 921 (1975) 20
Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832) 35, 36, 38

Constitutional Provisions and Statutes:

Act of April 30, 1908, 35 Stat. 85 2
Ariz. Rev. Stat.
9-461 44
12-136 45
Fallon Tribe Law & Order Code (1986)
4-40-010 12
4-40- 030(a) 12

Statutes—Continued: Page

1984 Idaho Sess. Law Ch. 72 44
1984 Idaho Sess. Law Ch. 119 (aa) 44
Nev. Rev. Stat.
41.430 ..... 9, 26, 45
233A.120 ..... 9, 45
233A.130 45
Indian Tribal Justice Act,
25 U.S.C. 3601(5) 9
25 U.S.C. 3601(4)-(6) 9
42 U.S.C. § 1983 ..... *passim*
Congressional History:
Bills considered during the 106th Congress (1999): H.R. 2, H.R. 22, H.R. 271, H.R. 410, H.R. 448, H.R. 617, H.R. 775, H.R. 795, H.R. 1141, H.R. 1470, H.R. 1475, H.R. 1565, H.R. 1944, H.R. 2242, H.R. 2352, H.R. 2366, H.R. 2366, H.R. 2456, H.R. 2512, H.R. 2926, H.R. 2956, H.R. 3291, H.R. 4288, H.R. 5241, H.R. 5327, H.R. 5330, H.R. 5344, H.R. 5529, H.R. 5606, S. 421, S. 438, S. 613, S. 615, S. 669, S. 685, S. 837, S. 1028, S. 1138, S. 1185, S. 1259, S. 1368, S. 1835, S. 2081, S. 2580, S. 2590, S. 2597, S. 2778, S. 3008, S. 3231 27
Bills considered during the 105th Congress (1998): H.R. 5, H.R. 52, H.R. 128, H.R. 253, H.R. 695, H.R. 992, H.R. 1195, H.R. 1340, H.R. 1376, H.R. 1503, H.R. 1531, H.R. 1534, H.R. 1805, H.R. 1861, H.R. 2015, H.R. 2021, H.R. 2141, H.R. 2607, H. R.2709, H.R. 3000, H.R. 3026, H.R. 3262, H.R. 3535, H.R. 3579, H.R. 3595, H.R. 3658, H.R. 3848, H.R. 4250, S. 5, S. 8, S. 78, S. 79, S. 514, S. 515, S. 610, S. 625, S. 648, S. 717, S. 781, S. 886, S. 977, S. 1224, S. 1256,

History—Continued Page

S. 1302, S. 1357, S. 1572, S. 1691, S. 1771, S. 1899, S. 1923, S. 2097, S. 2236, S. 2271, S. 2454, S. 2608..... 28

S. Rep. No. 106-150 (1st Sess. 1999)..... 28

Miscellaneous:

1990 *Annual Report to the Western Governors' Association, A New Era for State-Tribal Relations* (July 1990)..... 44

Milner S. Ball, *Constitution, Courts, Indian Tribes* 1987 Am. B. Found. Res. J. 1.....37, 39

Albert J. Beveridge, *The Life of John Marshall* (1919)..... 36

Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Moraliy*, 21 Stan. L. Rev. 500 (1969)... 36

Erwin Chemerinsky, *Federal Jurisdiction* (3d ed. 1999)..... 16

Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 Am. Ind. L. Rev. 353 (1994)..... 39

THE FEDERALIST No. 46 (James Madison)..... 23

Stanley G. Feldman and David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas* 79 Judicature 154 (1995)..... 44

David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., *Federal Indian Law: Cases and Materials*, (4th ed. 1998).....33, 43

Dennis Gibb, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922 (1999)..... 44

William T. Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* (1966).. 8

Martha C. Knack and Omer C. Stewart, *As Long as the River Shall Run: An Ethnohistory of the Pyramid Lake Indian Reservation* (1999)..... 1

Miscellaneous—Continued: Page

Peter C. Maxfield, *Oliphant v. Suquamush Tribe: The Whole is Greater Than the Sum of the Parts*, 19 J. Contemp. L. 391 (1993) 39
National Tribal Judges Association, *Justice and the American Indian: The Indian Judiciary and the Concept of Separation of Powers* (1974) 8
1994 NEV. OP. ATTY. GEN. NO. 19 45
1991 NEV. OP. ATTY. GEN. NO. 3 45
1980 NEV. OP. ATTY. GEN. NO. 42 45
Justice Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1 (1997) 46
Frank R. Pommersheim, *Tribal-State Relations: Hope For the Future?* 36 S.D. L. Rev. 239 (1991) . 44
So. Dak. C.L. 1-24-1(1) 44

STATEMENT OF THE CASE

This case is remarkable for the novel assertion that brings it before the Court. The petitioners, the State of Nevada and individual state officials, would have this Court rule that the state officials are exempt from the jurisdiction of a court simply by virtue of their official status and race. What mandates such exemption, according to the petitioners, is that the court in question is a tribal court. For the petitioners, the novelty here is the fact that an Indian sued non-Indian state officials in the court of a tribal jurisdiction. Pets. Brief at 1-2. But what appears to the petitioners as unusual for an Indian to attempt in a tribal court would not be unusual for others to undertake in the courts of other jurisdictions. *See, e.g., Hafer v. Melo,* 502 U.S. 21 (1991) (suit brought against state officials in their individual capacities); *Ortega v. Reyna*, 953 P.2d 18 (Nev. 1998) (suit brought against state officials for violations of federal and state law); *Boisclair v. Superior Court*, 801 P.2d 305 (Cal. 1990) (suit brought against tribal officials for conspiracy to commit tortious acts).

Respondent Floyd Hicks, a Native American, sued Nevada game wardens after they searched his property and seized personal possessions on two separate occasions on his trust allotment land within the reservation of the Fallon Paiute-Shoshone Tribes (the "Fallon Tribes"). Pet. App. A3-A4, B2-B3, E1-G1. The Fallon Tribes constitute a federally-recognized Indian community, of which Mr. Hicks is an enrolled member. The Fallon reservation, located in the Lahontan Valley in Western Nevada, is carved out of the Great Basin Region, part of the aboriginal territories of the Shoshone and Paiute peoples, who have inhabited the region since long before the genesis of the United States and the State of Nevada. *See generally* Martha C. Knack & Omer C. Stewart, *As Long as the River Shall Run: An Ethnohistory of the Pyramid Lake Indian Reservation* 1-28 (1999). The

reservation was established by federal authority under the Act of April 30, 1908, 35 Stat. 85.

Mr. Hicks filed two separate suits against the Nevada game wardens in the Tribal Court in and for the Fallon Paiute-Shoshone Tribes, complaining of damages arising from the alleged unlawful search and seizures on his trust allotment. The game wardens had conducted the two searches after obtaining tribal court approval for the execution of the warrants.[1] On each occasion, the game wardens obtained the warrant based on the same information of an unnamed informant who alleged that at one time, nearly two years prior to the first search, he had seen "recently killed" sheep in Mr. Hicks' possession which were believed to be evidence of off-reservation poaching of protected animals. Pet. App. E1-E2, F3-F4. The Nevada game wardens eventually conceded that they had found no evidence of any violations of law by Mr. Hicks, but only after having twice entered his trust allotment and searched his property, and having twice confiscated forty-year-old mounted big horn sheep heads of a subspecies other than that protected by Nevada law. Pet. App. B2-B3. The mounted heads are alleged to have been of great personal and financial value to Mr. Hicks. *See* Amended Complaint, J.A. 13. One of the mounted heads was allegedly damaged after it was seized by the game wardens and before its eventual return to Mr. Hicks. Pet. App. A11.

A retired tribal police officer with many years of honorable service, Mr. Hicks would not have expected to be subject to searches by law enforcement officials that would involve

---

[1] The state court had instructed that it:

> has no jurisdiction on the Fallon Paiute Shoshone Indian Reservation and before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute Shoshone Tribes.

Pet. App. G1.

unwanted intrusions in his home and the confiscation and mutilation of lawfully possessed and valuable property. In his complaints before the tribal court against the game wardens, Mr. Hicks alleged causes of action for tortious conduct in violation of tribal law and violations of federal civil rights remediable under 42 U.S.C. § 1983. He alleged malicious intent or bad faith on the part of the game wardens and claimed that they had acted beyond the scope of their lawful authority. Pet. App. I3. Mr. Hicks' claims raise numerous issues of fact, including the facial sufficiency of the affidavits relied upon for the warrants, the validity of the state search warrants, the legality of the tribal court orders authorizing execution of the warrants, the reasonableness of the game wardens in relying on those orders, the reasonableness of the searches, and the reasonableness of the seizure of Mr. Hicks' property. *Id.* at I3.

In addition to naming in his lawsuits the game wardens who conducted the search of his home on the Fallon reservation, Mr. Hicks named the State of Nevada and William Molini, Director of the Nevada Department of Wildlife.[2] He also named the tribal judge who purported to authorize the searches and the tribal police officers who accompanied the game wardens when they conducted the searches. Mr. Hicks later moved for and was granted a motion dismissing his claims against the State of Nevada and the state defendants in their official capacities. Pet. App. A5. The claims against the tribal judge and tribal police officers have also been either voluntarily dismissed by Mr. Hicks or otherwise resolved by the tribal court. *Id.* at B4. The only claims remaining in the tribal court are the claims against the state officials in their individual capacities—claims which

---

[2] On or about January 18, 2001, Mr. Hicks filed motions in both cases before the tribal court (CV-FT-91-034 and CV-FT-92-031) to drop William Molini as a defendant. A hearing has yet to be scheduled.

have been stayed for over six years pending federal court disposition of the petitioners' assertions.

While it is undisputed that Mr. Hicks' claims in tribal court are against state officials in their individual capacities, and the State of Nevada is no longer named as a defendant in the proceedings, the petitioners have challenged the jurisdiction of the tribal court on grounds of sovereign as well as individual immunity under state law. The petitioners also now contend that the tribal court lacks jurisdiction because the game wardens who have been sued are non-Indians and not members of the Fallon Tribes.

In their special appearance before the tribal court, the petitioners asserted sovereign and individual immunity as partial grounds for a motion to quash service of process. Pet. App. J1-J7. The tribal court twice quashed service, but on grounds other than immunity. *Id.* at L1. The Inter-Tribal Court of Appeals of Nevada reversed the tribal court's second order quashing service and remanded the case back to the tribal court for trial. *Id.* at C5. The petitioners then immediately sought federal court declaratory and injunctive relief against the exercise of tribal court jurisdiction.

In affirming the lower federal court, the Ninth Circuit Court of Appeals held that the tribal court does have jurisdiction over Mr. Hicks' causes of action and that the petitioners have not exhausted tribal court remedies with respect to their claims of immunity. Pet. App. A3.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit Court of Appeals should be affirmed.

1. The court of appeals correctly held that the Fallon tribal court has jurisdiction over the civil suits brought by Mr. Hicks against Nevada game wardens. Neither the game wardens' status as non-Indians and non-tribal members, nor their status as state officials, deprives the tribal court of jurisdiction.

a. The Fallon tribal court has jurisdiction to adjudicate Mr. Hicks' suits against individuals who are not members of the tribe. These suits arise out of the game wardens' alleged wrongful execution of searches and seizures, which occurred at Mr. Hicks' home on trust allotment land within the Fallon reservation. Pet. App. A3. Under tribal and federal law, the tribal court has jurisdiction over such non-member conduct on Indian land, including trust allotment land, within the reservation. *See Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). Even if Indian land status were not conclusive of tribal jurisdiction under federal law, the game wardens are subject to the jurisdiction of the tribal court in this case, because their conduct involves "consensual relationships with the tribe" and affects its "political integrity, . . . health [and] welfare." *Id.* at 446 (quoting *Montana v. United States*, 450 U.S. 544, 565-566 (1981)). The game wardens asked the tribal court for its permission and consent to enforce their state warrants, thereby purposefully availing themselves of the privilege of conducting activities within the exterior boundaries of the reservation. Further, their alleged violations of the rights of a tribal member, by acts purporting to rely on the authority of the tribe itself, threaten the tribe's political integrity and welfare.

b. Nor does the official status of the game wardens sued by Mr. Hicks pose a bar to the jurisdiction of the tribal court. The petitioners argue that state sovereign immunity divests the Fallon tribal court of "any jurisdiction over state officials," even if they are sued in their individual capacities. Pets. Brief at 7. This argument attempts to forge an exceptional jurisdictional bar to individual capacity suits against government officials, a bar that would apply exclusively to tribal courts. State officials do not have such blanket immunity from suit in state or federal court. Nor do tribal officials enjoy any similar jurisdictional immunity from suit in state court as a result of tribal sovereignty. *See* cases cited, *infra*, note 9.

This Court has firmly established that suits against government officials in their individual capacities to recover money damages, such as the suits pled by Mr. Hicks, are not suits against the sovereign and hence sovereign immunity poses no bar to jurisdiction over them. *See Hafer v. Melo*, 502 U.S. 21 (1991); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686-88 (1949). Individually sued officials may raise immunity defenses, but such defenses are contingent upon an adjudication of facts beyond merely establishing official status. No such adjudication has occurred in regard to the assertions of immunity against Mr. Hicks' lawsuits.

Federal law does not support the petitioners' argument for a special jurisdictional rule of blanket immunity for state officials that would be exclusive to tribal courts. The petitioners' reliance on the Eleventh Amendment and constitutional structure is misplaced. As this Court acknowledged in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991), Indian tribes were not parties to the constitutional convention. Hence, they are not subject to constitutional limitations on their authority, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), including any limitations of the Eleventh Amendment or constitutional structure that relate to state sovereign immunity. *Accord*, Brief *Amicus Curiae* of the States of Montana, et al. in Support of Petitioners ("States Amicus Brief") at 6. In the absence of any governing federal law, any immunity to be accorded state officials by a tribal court is a matter of comity and tribal law. *See generally Nevada v. Hall*, 440 U.S. 410 (1979), *reh'g denied*, 441 U.S. 917 (1979) (states not bound to accord sovereign immunity to one another).

c. The petitioners' effort to impose an exceptional rule of official immunity on tribal courts, and to hold tribes more generally divested of authority over non-members, is not aided by reliance on the colonial era doctrine of discovery or by related attempts to characterize tribes as inherently

inferior sovereigns. *See* States Amicus Brief at 22-26; Pets. Brief at 16-20. Such arguments are flawed in their assumptions about the historical facts, and they rest on attitudes that are at odds with American first principles of political ordering and with modern conceptions of racial equality. However much legal doctrine may have been constructed upon such flawed assumptions and attitudes in the past, it should not develop any further in that way. The "state of things," *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823), today must be one in which contemporary reality is reconciled with an understanding of tribes as—like states—having retained "the dignity, though not full authority, of sovereignty," *Alden v. Maine*, 527 U.S. 706, 715 (1999) (5-4 decision) (Souter J., dissenting).

d. The contemporary reality for the present case includes considerations of the negative impact on needed state-tribal cooperation that would potentially follow a decision of this Court providing state law enforcement officials with blanket immunity from tribal authority. Only recently have tribes and states been able to find sufficient common ground and respect for each other's sovereignty in order to establish cooperative arrangements for law enforcement and other mutual governance concerns. A decision rendering state officials completely immune from suit in tribal court, while leaving tribal officials exposed to suit in state courts, will significantly undermine this complex, burgeoning and vitally necessary framework of state-tribal intergovernmental cooperation, by creating disincentives for tribal government officials who are asked to permit state officials onto tribal lands to enforce state laws.

2. While not enjoying a blanket jurisdictional immunity from suit in tribal court, the individual petitioners may assert immunity defenses on the basis of facts and determinations of law that have not yet been adjudicated. The court of appeals was correct to hold that such immunity defenses

should be adjudicated by the tribal court prior to any federal court intervention. The existence and scope of any immunity in tribal court is subject to the application of tribal law, for which a tribal court should be accorded great deference. The fact that federal law may be implicated in the adjudication of the petitioners' immunity defenses does not justify federal court intervention prior to the exhaustion of tribal court remedies. The requirement of exhaustion of tribal remedies, which applies in regard to determinations of tribal court jurisdiction, see *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987), should also apply in regard to the petitioners' immunity defenses.

ARGUMENT

I. THE FALLON TRIBAL COURT HAS JURISDICTION OVER THE SUITS FILED BY MR. HICKS AGAINST STATE OFFICIALS IN THEIR INDIVIDUAL CAPACITIES FOR THEIR ALLEGED WRONGFUL ACTS ON TRUST LAND WITHIN THE RESERVATION.

Respondent Floyd Hicks is seeking relief from alleged illegal and tortious acts against him, through lawsuits before the court of the local sovereign under which he lives, the Fallon tribal court. Far from being a federal creation of the early twentieth century, see Pets. Brief at 26, the Fallon tribal court has deep historical roots in the pre-Columbian exercise of sovereignty by the country's first peoples. It is an integral part of the modern day manifestation of centuries-old authority structures that have governed the Paiute and Shoshone peoples since long before the State of Nevada was even contemplated. *See* National Tribal Judges Association, *Justice and the American Indian: The Indian Judiciary and the Concept of Separation of Powers* 18-19 n.6 (1974); William T. Hagan, *Indian Police and Judges: Experiments in Acculturation and Control*, 11-14 (1966).

The Fallon tribal court is among the country's numerous tribal justice systems that Congress has recognized as "an essential part of tribal governments," Indian Tribal Justice Act, 25 U.S.C. § 3601(5) (1994). Tribal courts are "important forums for ensuring public health and safety" and "for the adjudication of disputes affecting personal and property rights." *Id.* at § 3601(4)-(6). The State of Nevada itself statutorily recognizes the authority of tribal courts within the state, see Nev. Rev. Stat. § 233A.120, and provides that the state's "jurisdiction over civil causes of action . . . to which Indians are parties which arise in areas of Indian country in Nevada" shall exist only with the consent of the tribe concerned. Nev. Rev. Stat. § 41.430. The Fallon Tribes have given no such consent.

The petitioners, however, challenge the jurisdiction of the Fallon tribal court in this case on the basis of two factors, both of which relate to the status of the individual game wardens who were sued by Mr. Hicks: 1) their status as non-Indians and non-members of the Fallon Tribes, even though their alleged wrongful acts occurred on trust allotment land within the Fallon reservation; and 2) their status as officials of the State of Nevada, even though they are sued in their individual capacities. According to the petitioners, each of these characteristics, independent of the other, deprives the tribal court of jurisdiction as a matter of federal law.

The petitioners' jurisdictional challenge to the Fallon tribal court finds no basis in any federal statute, treaty, constitutional provision, or decision of this Court. For reasons described below, the Court should not oblige the petitioners' invitation to carve new, exceptional limitations on the exercise of tribal court jurisdiction. Such new limitations would be neither jurisprudentially sound nor conducive to much needed state-tribal cooperation.

A. The Lack of Tribal Membership of the Parties Sued by Mr. Hicks Does Not Deprive the Tribal Court of Jurisdiction as a Matter of Federal Law.

The court of appeals correctly held that the Fallon tribal court has jurisdiction over Mr. Hicks' suits against the individual petitioners, Nevada game wardens, although they are not Indians and not members of the Fallon Tribes. It is undisputed that the conduct giving rise to Mr. Hicks' claims—the search of his premises and the seizure of his property—took place on his trust allotment land within the Fallon reservation. The Fallon tribal court's jurisdiction was thus properly invoked with respect to "nonmember conduct on Indian land" over which "tribes retain considerable control." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997).

This Court has guarded the authority of Indian governments over their reservations, particularly where tribal land and tribal members are involved. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (recognizing that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty"). The Court has also fashioned some boundaries for the exercise of tribal jurisdiction. In *Montana v. United States*, 450 U.S. 544 (1981), the Court decided that the character of tribes is such that they lack civil jurisdiction over non-members on *non-Indian* land, but it also carved out two important exceptions to that rule. The Court held that tribes retain inherent sovereignty over non-member conduct even on non-tribally owned or controlled lands where their exercise of civil jurisdiction is based on a consensual relationship between the non-Indian and the tribe or its members. *Id.* at 565. The second exception is that an Indian tribe may "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct

effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

This Court's opinion in *Strate*, 520 U.S. 438, added clarity to the issue of tribal court jurisdiction and the application of the *Montana* rule in Indian country. The unanimous opinion of the Court in *Strate* recognized that the Court's precedent in the area of tribal civil jurisdiction in Indian country had been "variously interpreted." *Id.* at 453. However, the Court clarified that in *Montana* it was specifying a rule limiting jurisdiction only where "the Tribes cannot assert a landowner's right to occupy and exclude." *Id.* at 456. The Court observed that "in *Montana*, as in later cases following *Montana*'s instruction . . . the challenged tribal authority related to non-member activity on alienated, non-Indian reservation land. We 'can readily agree' in accord with *Montana* . . . that tribes retain considerable control over nonmember conduct on tribal land." *Id.* at 454 (citations omitted).

Under both *Strate* and *Montana*, tribal civil jurisdiction extends over non-Indian activities on land belonging to the tribe or land held in trust by the federal government for the tribe or its members. In *Strate*, this rule did not apply to allow tribal jurisdiction over a tort action arising out of an automobile accident on a public highway within a reservation, but only because the land in question was subject to a federal grant of right-of-way that precluded the tribe's exercise of proprietary rights and rendered the highway equivalent to non-Indian fee land. *Id.* at 454-56.

Here, the land in question is indisputably land to which Indian proprietary rights and strong tribal interests attach. Mr. Hicks' home, where the Nevada game wardens' alleged wrongful conduct took place, is within the borders of the Fallon reservation, on an allotment held in trust for him by the federal government. Pet. App. A3, B2, F1, I2. *See generally Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) (finding that trust allotments are

"Indian Country" and the equivalent of tribal land for jurisdictional purposes). Additionally, the Fallon Tribes retained sovereignty over Mr. Hicks' trust allotment. It had not ceded to the state even a temporary or furtive right to control access to this land. The state wardens were accompanied by a tribal officer upon execution of each warrant (Pet. App. H7, I1), clearly showing that tribal law enforcement authority was not ceded by the granting of a specifically restricted warrant to Nevada officials.

The Fallon Tribes have exclusive criminal jurisdiction over minor crimes committed by tribal members within the borders of the reservation. *See Ex parte Crow Dog*, 109 U.S. 556 (1883). Before conducting any search or seizure on the reservation to investigate state crimes committed by tribal members, state officials must obtain a tribal search warrant from a tribal judge. *See* Fallon Tribe Law & Order Code, Title 1 § 4-40-010, 4-40-030(a). *See also United States v. Anderson*, 857 F. Supp. 52 (D.S.D. 1994) (finding that a state officer could not search the reservation residence of an Indian without tribal warrant). The game wardens did so in this case. They asked for and obtained tribal court consent for their search on the reservation. Pet. App. F1, G1.

As the Ninth Circuit found, "The tribal court merely granted a state official's request to come onto the reservation for a limited, clearly delineated purpose under circumstances where all inherent jurisdictional authority lay with the Tribe." The tribal court had granted authorization to search "'exterior premises only and to vehicles thereon,' demonstrating that the Tribe retained authority to direct the state officers' activities on tribal land." *Nevada v. Hicks*, 196 F.3d 1020, 1028 (1999). The Fallon tribal court did not abdicate its ability to control the warrants it issued; there was no divestiture of authority to the State of Nevada. Given these circumstances, and the Indian land status of the location at which the Nevada game wardens' challenged conduct took place, the Ninth Circuit was correct in holding

that the *Montana* presumption against tribal jurisdiction over non-Indians on non-Indian land does not apply in this case.

But even if the *Montana* presumption against tribal jurisdiction were to apply, both of the *Montana* exceptions to the presumption would be met. As for the consent prong of the *Montana* exceptions, the state game wardens asked the tribal court for its permission and consent to enforce their state warrants. The federal district court in this case specifically found that "by executing the search warrant on the premises of Hicks' allotment, the individual game warden defendants purposefully availed themselves of the privilege of conducting activities within the exterior boundaries of the reservation on tribal land." *Nevada v. Hicks*, 944 F. Supp. 1455, 1461 (D. Nev. 1996) (citing *Hanson v. Denckla*, 357 U.S. 235 (1958)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). "Nonmembers who lawfully enter tribal lands remain subject to the tribe's power . . . to place conditions on entry, on continuous presence, or on reservation conduct." *Merrion*, 455 U.S. at 144-45.

As to the second *Montana* exception, the alleged violations of the rights of a tribal member, by acts purporting to rely on the authority of the tribe itself, threaten the tribe's political integrity and welfare. To maintain its political integrity, effectiveness and ability to provide a judicial forum for those—such as Mr. Hicks—who live under tribal law and jurisdiction and rely upon the court and its justice, the Fallon tribal court must be able to supervise the warrants it issues. One of the vital mechanisms for such supervision must include the authority to adjudicate civil actions brought by victims of alleged civil rights violations and torts committed by those officials who go beyond the limits imposed by a tribal court warrant. Respect for the limits set by a tribal court should be the same accorded to the limits on warrants issued by state or federal courts. To say that tribal courts do not have jurisdiction over claims against individuals

purporting to act on the authority of the tribal courts would be to truncate tribal power to enforce tribal laws on tribal land and throughout the reservation. Applying such a rule in this case would mean that the tribal court, in approving warrants to state officials, has no power to require that searches under those warrants be conducted according to the tribal court's restrictions and limitations.

The words of this Court in *Williams v. Lee* are apt here:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

358 U.S. 217, 223 (1959). Under the circumstances of this case and the rulings of this Court, the non-tribal member status of the game wardens sued by Mr. Hicks does not render the Fallon tribal court without jurisdiction.

B. The Petitioners' Claim of State Sovereign Immunity Does Not Bar Tribal Court Jurisdiction Over Mr. Hicks' Suits Against State Officials in Their Individual Capacities.

Apart from their status as non-tribal members, the game wardens' status as Nevada officials is said to pose a bar to the jurisdiction of the Fallon tribal court. The petitioners argue that this bar arises from the sovereign immunity of the state and the derivative immunities of its officers. Pets. Brief at 9-29. The petitioners effectively argue for an extraordinary rule of blanket immunity for state officials from suit in tribal court, such that tribal courts should be considered lacking in jurisdiction in all cases—no matter what the circumstances—in which state officials are named

as defendants for acts related to their official functions.[3] Such a far-reaching rule of blanket immunity for government officials is unknown in the American legal system, and if accepted by this Court would apply only to tribal courts—and not state and federal courts—unless the Court were to compound rejection of decades of its own jurisprudence.

1. Suits to Recover Money Damages from State Officials Personally, Such as the Suits Brought by Mr. Hicks, are Not Jurisdictionally Barred by State Sovereign Immunity.

It has long been established that a suit for money damages against state officers in their individual capacities—such as the suits by Mr. Hicks in this case—may be brought in an appropriate forum for wrongful conduct fairly attributable to the officers. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949) ("the principle that an agent is liable for his own torts 'is an ancient one and applies even to certain acts of public officers or public instrumentalities,'" quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580 (1943)); *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974); *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 462 (1945). The jurisdictional impediments arising from state sovereignty that may exist in regard to suits against states or against agents in their *official* capacities, simply are not present when state agents are sued—as here—in their *individual* capacities.

"[T]he distinction between official-capacity suits and personal capacity suits is more than 'a mere pleading

---

[3] This characterization of the petitioners' position is in accord with that of the States Amicus Brief. "Petitioners invoke an absolute immunity against the attempted exercise of any form of tribal authority . . . a broader rule with respect to the individual Petitioners' immunity than may exist where federal or state tort law claims are involved." States Amicus Brief at 6, 8.

device.'" *Hafer v. Melo*, 502 U.S. 21, 26 (1991) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (citation omitted)). Personal capacity suits are those that seek relief against officials personally, rather than relief that "'would expend itself on the public treasury or domain, or interfere with the public administration,' or . . . 'restrain the Government from acting, or . . . compel it to act.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, n.11 (1984) (quoting *Dugan v. Rank*, 372 U.S. 609 (1963)). *See also Larson*, 337 U.S. at 688 (a suit is not against the state where the judgment sought "will not require action by the sovereign or disturb the sovereign's property"). Claims against officers to recover damages from them personally, such as those pled by Mr. Hicks in the present case under tribal and federal law, are not suits against the state. *See id.* at 687; *Hafer*, 502 U.S. at 25-29; Erwin Chemerinsky, *Federal Jurisdiction* 421 (3d ed. 1999).[4] Further, an individual capacity suit is not converted into one against the state where the state voluntarily, or as a matter of policy or state law, defends or indemnifies the state official sued. *See Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988); *Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985), *distinguished on other grounds*, *MacFarland v. Oakland*

---

[4] The petitioners (Pets. Brief at 20-21) confuse individual capacity damage suits, which are deemed not against the state, with the limited exception of *Ex parte Young*, 209 U.S. 123 (1908), which permits suits against officers in their *official capacities* where constitutional violations are alleged and the relief sought against the state is limited to prospective injunctive relief. *Cf. Edelman v. Jordan*, 415 U.S. 651 (1974) (declining to extend the *Ex parte Young* exception to allow retrospective injunctive and monetary relief in suit against state official sued in his official capacity); *Pennhurst*, 465 U.S. 89 (1984) (declining to extend exception to allow relief that would operate against state agency under pendent state claims in federal court). The *Ex parte Young* exception to the Eleventh Amendment bar for official capacity suits is irrelevant and not being invoked here.

County, 869 F.2d 1491 (6th Cir. 1989) (en banc); *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985); *Darul-Islam v. Dubois*, 997 F. Supp. 176 (D. Mass. 1998).

In the context of actions under 42 U.S.C. § 1983, this Court has unambiguously rejected the proposition that the official status or function of an individually-named defendant implicates a jurisdictional bar of state sovereign immunity. *See Hafer*, 502 U.S. at 26 (distinguishing individual capacity suits from suits against officers "acting in their official capacities," a phrase "best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury").[5] Likewise, this Court previously rejected the argument, also advanced now by the petitioners, that state officials should be immune from any suit related to their official functions because the officials' performance of their public duties may be hampered by damage claims. *Id.* at 31 (such concerns are properly addressed within the framework of personal immunity defenses) (citing *Forrester v. White*, 484 U.S. 219 (1988)).

By an argument flawed in its premise, the petitioners attempt to avoid the straightforward jurisprudence of this Court that upholds personal capacity lawsuits against state officials. The petitioners misconstrue § 1983 as a congressional abrogation of state sovereign immunity and, upon that premise, construct an elaborate argument that such abrogation does not, and could not, extend to tribal courts. On this ground, the petitioners advocate dismissal of Mr. Hicks' § 1983 claims. Pets. Brief at 24-29. Likewise, the petitioners argue that Mr. Hicks' individual capacity suits

---

[5] In actions under § 1983, a claim that the activities were allegedly performed by way of "official acts" actually establishes the element necessary for bringing a § 1983 claim. *Hafer*, 502 U.S. at 27. (The requirement of "action under color of state law" means that the state officials may be liable "precisely because of [their] authority . . . .").

based on tribal law claims are not permitted since there has been no valid abrogation of state sovereign immunity in that regard either. Pets. Brief at 22-23.

Because the premise of the argument is wrong, the argument fails from its outset. Apparently, the petitioners are attempting to disturb the settled interpretations of § 1983, which establish that the statute affects no abrogation of state sovereign immunity, and that it does not rely on any such abrogation in providing a cause of action against state officials individually. *See Hafer*, 502 U.S. at 30; *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) (enactment of § 1983 not intended to abrogate Eleventh Amendment immunity and authorize suits against states); *Quern v. Jordan*, 440 U.S. 332, 345 (1979). Thus, no "clear statement" on the part of Congress is required to show it intended to abrogate state sovereign immunity to allow § 1983 actions specifically in tribal court, since no such abrogation is implicated by such actions.[6]

Instead, the ordinary presumptions apply: Individual capacity suits under § 1983 are not suits against the state, and tribal courts, as courts of general jurisdiction, can apply federal law and entertain causes of action under § 1983 as part of their inherent authority. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999) ("Tribal courts can, and do decide questions of federal law . . .") (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (tribal courts available to vindicate federal rights)). *See also Landmark Golf, Ltd. v. Las Vegas Paiute Tribe*, 49 F. Supp. 2d 1169, 1174 (D. Nev. 1999) ("A claim that a federal statute deprives a tribal court of jurisdiction will fail

---

[6] Having posited erroneously that individual capacity suits under § 1983 are based on a congressional abrogation of state sovereign immunity, the petitioners search in vain for a "clear statement" from Congress that it intended the abrogation to extend to tribal courts and for tribal courts to entertain § 1983 claims. Pets. Brief at 24-27.

unless it can be shown that the statute contains an express jurisdictional prohibition.") (citing *Middlemist v. Secretary of Interior*, 824 F. Supp. 940 (D. Mont. 1993), *aff'd without opinion*, 19 F.3d 1318 (9th Cir. 1994), *cert. denied*, 513 U.S. 961 (1994)).

As with his claims under § 1983 against the individual petitioners, Mr. Hicks' claims under tribal law are limited to seeking relief against these officials in their individual capacities. And just as his § 1983 claims, his tribal law claims do not depend on an abrogation of sovereign immunity, so none need be established here.

Sovereign immunity is no more forbidding, as a matter of federal law, in respect to Mr. Hicks' tribal law claims than it is in relation to his § 1983 claims. The principle that government officials may be sued individually has been upheld consistently for actions other than § 1983 claims,[7] including claims based on state law.[8] Significantly, state courts have adjudicated state law claims against individually named tribal officials, notwithstanding the federal law-protected sovereign immunity of tribes, within the same

---

[7] *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (White House officials had qualified immunity defense, but not an absolute or jurisdictional immunity, in non-§ 1983 "damages suit based on their official acts"); *Larson*, 337 U.S. at 686 ("no jurisdictional difficulty" where suit is to recover damages against agents personally, "whether sounding in tort or contract"); *Ford Motor*, 323 U.S. at 462 ("Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally.").

[8] *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1271 (5th Cir. 1992) ("*Pennhurst* and the Eleventh Amendment do not deprive federal courts of jurisdiction over state law claims against state officials strictly in their individual capacities"); *accord, Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 102 (2d Cir. 1998); *Peña v. Gardner*, 976 F.2d 469, 473 (9th Cir. 1992) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 111 n.21 (1984)).

logic and subject to the same defenses under which personal capacity suits have proceeded in federal court.[9]

To be sure officials sued individually under § 1983, or pursuant to other causes of action, may affirmatively raise and attempt to prove immunity defenses on the basis of assertions of good faith or other considerations that go beyond or challenge the allegations of the complaint. *See Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (§ 1983 to be read "in harmony with general principles of tort immunities and defenses"); *Wood v. Strickland*, 421 U.S. 921, 999-1000 (1975) (describing common law qualified good faith immunity for tort actions as applicable to § 1983 actions). *Cf. Turner v. Martire*, 82 Cal. App. 4th 1042 (Cal. Ct. App. 2000) (tribal law enforcement officers subject to suit unless they could demonstrate common law immunity upon

---

[9] *See, e.g., White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 658 (Ariz. 1971) (tribal officials "not immune from being sued individually [in breach of contract case] for any actions in excess of their duties"); *Burnham v. Pequot Pharm. Network*, No. CV95536264, 1998 WL 345463 (Conn. Super. Ct. June 19, 1998) (motion to dismiss employment claims against individual tribal officials on grounds of tribal immunity denied); *Drumm v. Brown*, No. CV960079971, 2000 WL 73277 (Conn. Super. Ct. Jan. 10, 2000) (tribal immunity held not to shield tribal officials from suit based on their alleged "[i]ntentional, tortious misconduct"); *Boisclair v. Imperial Granite Co.*, 51 Cal. 3d 1140, 1158 (Cal. 1990) (tribal official may be held liable when conduct is in excess of authority); *Hegner v. Dietze*, 524 N.W.2d 731 (Minn. Ct. App. 1994) (factual issues remained about whether immunity should be provided to tribal official); *Gayle v. Little Six, Inc.*, No. C5-99-430, 2000 WL 16320 (Minn. Ct. App. Jan. 11, 2000) (scrutinizing claims of sovereign and qualified immunity). *See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (while sovereign immunity of tribe bars suit against it, "[w]e have never held that individual agents or officers of a tribe are not liable in actions"); *Santa Clara Pueblo*, 436 U.S. at 59 (tribal officials may be sued for violation of civil rights although tribes themselves are immune); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000) (copyright claims dismissed against tribe but not against individual defendants).

showing that conduct was discretionary and within scope of official duties). And, as discussed in Part II, *infra*, the tribal forum is available to the petitioners to assert such defenses against the lawsuits filed by Mr. Hicks. But the potential availability of immunity defenses in personal capacity suits does not, without more, deprive a court of jurisdiction. *See Larson*, 337 U.S. at 687 n.7 (contrasting individual immunity defenses in tort or contract actions with "limitations on the court's jurisdiction to hear a suit directed against the sovereign"). *Cf. White Mountain Apache*, 480 P.2d at 658 (jurisdiction upheld for individual claims against tribal officials and case remanded to determine whether alleged acts were within scope of official duties in respect to immunity defense). It would require a substantial leap beyond existing precedent to find the jurisdictional bar advocated by the petitioners, a bar that would provide what amounts to a blanket immunity for state game wardens such as those sued by Mr. Hicks.

2. *Federal Law Does Not Impose on Tribal Courts a Special Jurisdictional Rule of Blanket Immunity for State Officials.*

In the face of consistent precedent declining to regard state sovereign immunity as a jurisdictional bar to suits against state officials in their individual capacities, the petitioners argue for a novel jurisdictional rule of blanket official immunity that would be unique to tribal courts. State sovereign immunity is claimed by the petitioners to be a force that limits the authority of Indian tribes and their courts to an extent it does not (and cannot) for other sovereigns. But the petitioners can point to no federal statute or treaty that imposes on tribal courts the extraordinary state official immunity that they advocate, because none exists.

In the absence of any such federal statute or treaty, the petitioners' argument rests on constitutional norms interpreted in light of factors that are particular to tribes. But

rather than support the petitioners' position, the particular status of tribes in relation to the Constitution points in the other direction. Not only does the Constitution fail to provide state officials with a blanket immunity from suit in tribal court, it is at best tenuous in the extent to which it extends to tribal jurisdictions any immunities at all deriving from state sovereignty

a. The Constitution does not extend state sovereign immunity to bar tribal court jurisdiction over state officials sued in their individual capacities.

The petitioners base their argument on the Eleventh Amendment and an account of constitutional structure, relying on decisions of this Court that have found constitutional protection for state sovereign immunity against the federal government. Pets. Brief at 10-32 (citing, *inter alia, Alden v. Maine*, 527 U.S. 706 (1999); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)). The petitioners' novel constitutional theory is off the mark, because the constitutional protections and corresponding limitations invoked by the petitioners, and developed by the Court in the cases cited, have no application here.

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).[10] It follows that

[10] The fact that Indian tribes were parties to some of the Court's recent sovereign immunity cases is irrelevant for the purposes of the present case, despite what the petitioners would lead this Court to believe. As

constitutional limitations that extend from state sovereign immunity do not apply to tribes or their courts. *See Montana v. Gilham*, 133 F.3d 1133, 1136 (9th Cir. 1998), ("the Eleventh Amendment offers no constitutional limit on the jurisdiction of tribal courts just as it does not limit the jurisdiction of sovereign states").[11]

First principles of American constitutionalism, including the framers' canons of popular sovereignty,[12] dictate that the constraints arising from the Constitution not apply to the tribes, which were excluded from the process by which the Constitution was adopted. This Court has understood the constitutional norms of state sovereign immunity, as well as the limitations those norms impose on the authority of the federal government, as a product of a consensual compact among the states. *See, e.g., Alden*, 527 U.S. at 725-727 (5-4

---

discussed below, the outcomes of *Alden, Seminole, Blatchford,* and *Coeur d'Alene* were not predicated on the tribal status of the parties attempting to invoke federal jurisdiction, but rather on an assessment of the constitutional limitations on the invoked federal jurisdiction.

[11] The Ninth Circuit in *Gilham*, however, ultimately determined that tribal courts do not have jurisdiction to entertain suits against states, upon the reasoning that such authority is not consistent with their character and dependent status. For reasons discussed below, this alternative theory for finding tribal authority diminished by state sovereignty is flawed. *See, infra*, pp. 31-42. In any event, while finding tribal courts jurisdictionally barred to adjudicate suits against states, the Ninth Circuit in that case did not foreclose its holding in the present case affirming tribal court jurisdiction for individual capacity suits against individually named state officials.

[12] As James Madison stated:

> [T]he ultimate authority, wherever the derivative may be found, resides in the people alone; and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expence of the other. Truth no less than decency requires, that the event in every case, should be supposed to depend on the sentiments and sanction of their common constituents.

THE FEDERALIST No. 46 (James Madison).

decision) (Souter, J., dissenting) (describing consensual state concerns behind the creation of the Eleventh Amendment); *Nevada v. Hall*, 440 U.S. 410, 418-19 (1979) (during debate and ratification of Eleventh Amendment, states "vitally interested" in scope of delegated federal judicial power). In *Blatchford*, the Court highlighted that the Constitution did not alter attributes of tribal and state sovereignty in relation to each other, since tribes were not parties to the constitutional compact. 501 U.S. at 782 ("absurd" to suggest that tribes surrendered their own immunity "in a convention to which they were not even parties"). Thus, in concluding that federal courts are without jurisdiction to hear suits by tribes against states, the Court in *Blatchford* found tribes to be, in relevant respects, analogous to foreign states which stand outside the constitutional structure. *Id.* The Court reasoned that tribes, like foreign states, were not parties to the constitutional "mutuality of concession" by which states agreed to subject each other to suit in federal court upon delegating authority to the federal judiciary. *Id. Cf. Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934). Similarly, the tribes, like foreign states, were not parties to any mutuality of concession by which they might be bound to limit their judicial authority in favor of an extraordinary blanket immunity for state officials.

b. This Court's federalism jurisprudence is inconsistent with a rule of extraordinary state official immunity exclusive to tribal courts.

Adherence to the logic of a consensual constitutional order resulted in the Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979) (Blackman, J., dissenting; Rehnquist, J., dissenting), in which it was held that the mutuality of concession in the constitutional compact did not include an agreement among the states to accord sovereign immunity to one another. In determining that Nevada's claimed

sovereign immunity and derivative state law immunities for Nevada officials were not binding on the courts of California or other states, the Court concluded that the Constitution did not alter the freedom of each state to determine whether or not to extend immunities to other states as a matter of comity. *Id.* at 425.

The implication of *Hall* for tribal courts is clear. If the Constitution did not establish for states an obligation to yield to the sovereign immunity claims of other states, it could not have imposed on tribes a similar obligation, much less an obligation to effectively accord state officials an extraordinary blanket immunity. As in *Blatchford,* the tribes are like foreign states in respect to the sovereign immunity of states. Not only did they fail to agree to inter-sovereign immunities for the benefit of states of the Union as part of the constitutional plan, they were not even part of the plan. States, and in certain circumstances state officials, may be extended immunities in tribal courts as a matter of comity. But rather than being a function of limitations in the Constitution's text or structure, the extent of state or official immunity in tribal court (assuming jurisdiction otherwise) remains a matter of the relevant tribal law, and where applicable, federal law.[13]

---

[13] This outcome is not changed by the fact that reservation lands, or other Indian country over which tribal court jurisdiction extends, are invariably geographically located within states. Despite such geography, states have no power to dictate rules that are binding on the exercise of tribal authority within Indian country, other than pursuant to congressional authorization. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this nation's history."); *Arizona v. Turtle*, 413 F.2d 683 (9th Cir. 1969) (state officers do not have jurisdiction to conduct activities on Indian land and must adhere to tribe's legal procedures). Congress has not authorized Nevada to dictate rules of immunity to the Fallon tribal court. *See, infra*, notes 16-19 and accompanying text. Additionally, Nevada by statute recognizes it has no

This conclusion follows from the pre-constitutional principle that the immunity of a sovereign in the courts of another sovereign is determined by the law of the forum sovereign, absent an express or implied agreement to the contrary. *See Hall*, 440 U.S. at 416.[14] In *Hall*, the Court relied on Chief Justice Marshall's reiteration of this principle in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812),[15] thus shedding light on the original understanding of the nature of sovereign immunity as it existed at the time of the convention and what the constitutional plan was not meant to accomplish in relation to it.

---

jurisdiction over civil actions arising in Indian country unless the tribe consents to such jurisdiction. *See* Nev. Rev. Stat. § 41.430(4) (jurisdiction over proceedings in which Indians are parties); *see generally Snooks v. Ninth Judicial Dist. Court*, 919 P.2d 1064 (Nev. 1996). In this particular case, the state court judge, in responding to the first request for a search warrant, specifically acknowledged that he had no jurisdiction over the Fallon Reservation. Pet. App. G1.

[14] The Court in *Hall* surveyed the doctrine of sovereign immunity as it existed at the founding of the Union and discerned that it was "an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts [in which immunity could be binding] and the other to suits in the courts of another sovereign [in which immunity may be extended but only as a matter of comity] . . . . his explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts." 440 U.S. at 416.

[15] In *The Schooner Exchange*, Chief Justice Marshall considered the question of jurisdiction of an American court over a vessel in which Napoleon, the reigning Emperor of France, claimed a sovereign right. Marshall reasoned that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute . . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." 11 U.S. (7 Cranch) 116, 136 (1812). After noting that the source of any immunity for the French vessel must be found in American law, the Chief Justice interpreted American law as recognizing such an immunity in accordance with the common usage among nations at the time. *Id.* at 136-40.

Admittedly, the analysis here suggests an asymmetry in state-tribal relations that is perhaps uncomfortable. While an absence of relevant federal and constitutional prescriptions leaves tribes free to decide for themselves issues of state immunity from suit, constrained only by principles of comity, federal law clearly mandates that state courts accord immunity from suit to tribes. *See Kiowa Tribe of Okla. v. Manufacturing Techs., Inc*, 523 U.S. 751 (1998). However, Mr. Hicks is not attempting to benefit from or maintain such an asymmetry. Rather, he is trying to avoid the converse asymmetry that the petitioners advocate: a condition in which state officials may not be sued in tribal court in their individual capacities, while individually named tribal officials may be sued in state court. *See* cases cited, *supra*, note 9.

The condition that exists to free tribal courts from state sovereign immunity is a product of a constitutional order that excludes tribes and renders them subject to the political domain in which Congress is prevalent. *Cf. Kiowa Tribe*, 523 U.S. 751 (tribal sovereign immunity, subject to congressional plenary authority). Any altering of this condition is best handled by Congress. Congress has not been idle relative to the examination of sovereign immunity. In the last session of Congress, no less than fifty bills were considered that contained concepts of sovereign immunity at either the international, federal, state, or tribal level,[16] and no less than fifty-five such bills were considered during the

---

[16] Bills during the 106th Congress (1999): H.R. 2, H.R. 22, H.R. 271, H.R. 410, H.R. 448, H.R. 617, H.R. 775, H.R. 795, H.R. 1141, H.R. 1470, H.R. 1475, H.R. 1565, H.R. 1944, H.R. 2242, H.R. 2352, H.R. 2366, H.R. 2366, H.R. 2456, H.R. 2512, H.R. 2926, H.R. 2956, H.R. 3291, H.R. 4288, H.R. 5241, H.R. 5327, H.R. 5330, H.R. 5344, H.R. 5529, H.R. 5606, S. 421, S. 438, S. 613, S. 615, S. 669, S. 685, S. 837, S. 1028, S. 1138, S. 1185, S. 1259, S. 1368, S. 1835, S. 2081, S. 2580, S. 2590, S. 2597, S. 2778, S. 3008, S. 3231.

105th Congress.[17] It is clear from the versions of the legislation involving Indian tribes that Congress is carefully examining the issues of sovereign immunity in various contexts.[18] In particular, "over the last several years, the Congress has held extensive hearings" and spent countless hours examining sovereign immunity in the tribal-state context[19] and has chosen not to make a law granting state officials the kind of blanket immunity from the exercise of tribal authority that the petitioners advocate here.

The Court need not decide in this case whether states themselves are immune from suit in tribal court. But if the Court were to declare an extension of state sovereign immunity to tribal courts, such an extension should be consistent with the federal common law which allows individual capacity suits. *Cf. Montana v. Gilham*, 932 F. Supp. 1215, 1223 (D. Nev. 1996), *aff'd*, 133 F.3d 1133 (9th Cir. 1998) (holding tribes bound to accord states sovereign immunity, since states must accord tribes sovereign immunity).

---

[17] Bills during the 105th Congress (1998): H.R. 5, H.R. 52, H.R. 128, H.R. 253, H.R. 695, H.R. 992, H.R. 1195, H.R. 1340, H.R. 1376, H.R. 1503, H.R. 1531, H.R. 1534, H.R. 1805, H.R. 1861, H.R. 2015, H.R. 2021, H.R. 2141, H.R. 2607, H. R.2709, H.R. 3000, H.R. 3026, H.R. 3262, H.R. 3535, H.R. 3579, H.R. 3595, H.R. 3658, H.R. 3848, H.R. 4250, S. 5, S. 8, S. 78, S. 79, S. 514, S. 515, S. 610, S. 625, S. 648, S. 717, S. 781, S. 886, S. 977, S. 1224, S. 1256, S. 1302, S. 1357, S. 1572, S. 1691, S. 1771, S. 1899, S. 1923, S. 2097, S. 2236, S. 2271, S. 2454, S. 2608.

[18] *See, e.g.*, the introduced version of S. 2580 contained language intended to disclaim any waiver of sovereign immunity, but the reported version struck that language; the enrolled version of H.R. 3291 contains a disclaimer of any waiver of sovereign immunity, but the introduced version did not contain such a provision. Both H.R. 795 and S. 438 contain limited waivers of the sovereign immunity of the United States in all versions.

[19] S. Rep. No. 106-150, at 11 (1st Sess. 1999).

The controlling principle of *Hall*, and the narrower proposition advanced here to maintain individual capacity suits, are not changed or undermined by this Court's subsequent state sovereign immunity jurisprudence. Rather the principle has been confirmed. In *Alden* the Court was careful to distinguish the situation before it, in which the state was asserting immunity from a federal cause of action in its own court, from that of *Hall*, in which Nevada was asserting immunity in a sister state court. *Alden*, 527 U.S. at 738-39. Likewise, instead of suggesting limitations on state or tribal courts, the Court in *Blatchford*, *Coeur d'Alene*, *Pennhurst*, and *Seminole Tribe* concerned itself with the limitations on *federal* judicial and legislative power resulting from the delegated nature of federal authority and the unique constitutional compact among the states, a compact to which the tribes with their inherent authority are not parties.[20] In each of these cases, the Court addressed attempts at invoking federal court jurisdiction or federal law to sue states or their agencies; it did not suggest jurisdictional constraints on individual capacity suits of the kind involved here.[21]

---

[20] *See Alden v. Maine*, 527 U.S. 706 (1999) (suit brought in state court under federal Fair Labor Standards Act); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (suit brought in federal district court on federal equal protection and state law grounds); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (suit brought in federal district court on quiet title action); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (suit brought in federal district court for violation of federal constitutional and statutory rights and state law); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (suit brought in federal district court under Indian Gaming Regulatory Act).

[21] *See Alden*, 527 U.S. at 711 (suit brought against State of Maine); *Blatchford*, 501 U.S. at 778 (suit brought against Commissioner, Department of Community and Regional Affairs of Alaska, in official capacity); *Coeur d'Alene*, 521 U.S. 261 (suit brought against State of Idaho, state agencies and state officials (quiet title action against officials found to be against the state due to effect on state ownership and control of land)); *Pennhurst*, 465 U.S. 89 (suit brought against Pennsylvania

Nowhere in these decisions is it suggested that the Eleventh Amendment, or related norms implicit in the constitutional plan or structure, are limitations upon the authority of tribal courts, much less that state sovereign immunity constitutionally extends to bar tribal court jurisdiction over individually sued state officials.

In their *Amicus Curiae* brief, eighteen states (the "*amici* states") take note of the limitations on federal authority "of not only the Tenth and Eleventh Amendments but also the States' sovereign immunity 'inher[ing] in the system of federalism established by the Constitution.'" States Amicus Brief at 17 (quoting *Alden*, 527 U.S. at 730). However, in stark contrast to the petitioners' theory, the states concur with the respondent Hicks that:

> [n]o like limitations exist with respect to the exercise of inherent authority by Indian tribes. As this Court has long held, tribes are extra-constitutional quasi-sovereigns not constrained by the Bill of Rights . . . or, presumably, any other provision of the Constitution.

States Amicus Brief at 25 (citing *Talton v. Mayes*, 163 U.S. 376, 384 (1896)); *Blatchford*, 501 U.S. at 782. The petitioners' constitutional theory for a blanket immunity against tribal jurisdiction, accordingly, should be rejected.

---

institution, Pennsylvania Department of Public Welfare and various state officials (state law claim against officials found to be against state because it would force state to amend laws)); *Seminole*, 517 U.S. 44 (suit brought against State of Florida and its Governor).

C. The Argument that this Case Should Establish an Additional Divestiture of Tribal Jurisdiction Rests on an Historically and Doctrinally Inaccurate View of the Effects of the European Discovery of Indian Lands, a View which Cannot be Sustained Under Modern Principles of Racial Equality.

Ultimately, the petitioners argue for a finding of no tribal court jurisdiction in this case, not on the basis of any consensual arrangement of the kind that defines federal-state relations, nor on the basis of controlling precedent, but rather on the basis of an alleged implied "additional divestiture of tribal power" that has not yet been identified by this or any other court. Pets. Brief at 18. According to the petitioners, such an implied divestiture, which this case newly "exposes," results in tribal courts lacking any jurisdiction over non-Indian state officials even when they enter onto tribal land and otherwise subject themselves to the authority of the tribe. The petitioners cannot identify precisely when or how Indian tribes were divested of their inherent tribal authority over tribal land under United States law. They identify this implied limitation as having been imposed "surely . . . when the nation was formed." *Id.*

Having avoided the petitioners' erroneous constitutional argument, the *amici* states embrace a variant of the implicit divestiture theory. With equal vigor, but also without basis in historical fact or controlling precedent, the *amici* states urge this Court to use this case to "restrict or eliminate inherent tribal authority" over state officials and their conduct on tribal land. States Amicus Brief at 22. Echoing the petitioners' conviction, they assert that states acquired immunity against the tribes and rendered them inferior sovereigns "necessarily . . . at the time of the Nation's founding." *Id.* at 7.

While the petitioners remain vague about the source of the additional implicit divestiture of tribal jurisdiction that it

would have this Court declare, the *amici* states reveal explicitly what is at the foundation of the effort to find a new divestiture of tribal power: an historically inaccurate and outmoded rendition of the European "doctrine of discovery." States Amicus Brief at 23.

Their misguided, joint effort to have this Court manufacture and declare a wholly new divestiture of tribal powers, in the absence of any federal treaty or congressional act, rests on a view of the doctrine of discovery that is at odds with the one incorporated into federal common law by this Court over a century and a half ago. The petitioners and *amici* states adopt what can be called the enlarged version of the doctrine, which was attractive to European colonial powers during the colonial era. Under this version of the doctrine, the mere act of "discovering" Indian tribes and their lands is deemed to vest the discoverer with complete sovereignty over the tribes and render the tribes' own sovereignty diminished and subjugated.

In its enlarged version, the discovery doctrine sets aside bedrock principles of popular sovereignty and allows for a political order to be constructed upon rank inequality and the exercise of power. Moreover, with its roots in the same colonial era attitudes that justified slavery, the enlarged version of the doctrine of discovery remains "frozen in an age of racial discrimination," *Mabo v. Queensland* (1992) 107 A.L.R. 1, ¶ 41 (Austl.) ("*Mabo II*"). The argument advanced now to urge a finding of additional divestiture of tribal authority, insofar as it rests on the doctrine of discovery, cannot be sustained under modern principles of racial equality. It should not be entertained by this Court.

1. Because of the Problematic Aspects of the Doctrine of Discovery, this Court was Careful to Limit its Reach Such that the Doctrine Should Have No Application Here.

The legal fiction that the discovery of the New World by Europeans resulted in inherent limitations on tribal rights and sovereignty in favor of the European discovering nation traces its origins back to an archaic set of legal rules and principles originating in the Middle Ages and the Crusades to the Holy Lands.[22] As the Australian High Court ruled in recognizing the aboriginal title rights of that country's indigenous peoples in its landmark decision, *Mabo II*, an "enlarged" interpretation of the discovery doctrine as vesting absolute rights of sovereignty and title in a European discoverer of lands occupied by non-Christian "backward peoples" depended on "a discriminatory denigration of indigenous inhabitants, their social organization and

---

[22] Under the Roman Catholic Church canon law's legal theory of universal papal jurisdiction "over all men and power over them in law but not in fact," Pope Innocent IV, *Commentaria Doctissima in Quinque Libros Decretalium* (c. 1250 A.D.), *reprinted in* David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., *Federal Indian Law: Cases and Materials* 43 (4th ed. 1998), Christian princes were authorized throughout the medieval era by the Pope to undertake holy wars of conquest against the "heathen" and "infidel" peoples of the Levant who opposed the Church's assertion of superior rights over the Holy Lands. *See* Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* 34-50 (1990). It was under this same legal theory holding that non-Christian "savage" peoples were under the superior and absolute *de jure*, if not the *de facto*, sovereignty and jurisdiction of the Pope, that Pope Alexander VI made his famous donation of the New World to Spain by the papal bull *Inter caetera divinai* (1493). The Pope's bull granting Spain the entire New World invested the Spanish Crown with "full, free and integral power, authority and jurisdiction," and forbade any other person to interfere with the Crown's rights in the New World for purposes of trade or for any other reason, upon pain of excommunication.

customs." *See id.* at ¶ 33, ¶ 39. It regarded the lands occupied by indigenous tribal peoples as *terra nullius*; vacant lands, because the peoples were "so low in the scale of social organization" that Europeans need not recognize their legal systems or governing authority over the lands they occupied. *Id.* at ¶ 41. Significantly, based on Australia's Racial Discrimination Act of 1975, international human rights standards, and modern principles of racial equality, the Australian High Court refused to accept such a doctrine as the "contemporary law" of a civilized democratic state, and ruled that it would not allow its domestic law to be "frozen in an age of racial discrimination" by continuing to accept the enlarged view of *terra nullius* advocated by the State of Queensland in *Mabo II*. *Id.*

The petitioners and the *amici* states would have this Court ignore the colonial era history and origins of the doctrine of discovery and related conceptions of inherently diminished tribal power. This Court, however, long ago took judicial notice of the discovery doctrine's racially discriminatory origins, and limited its effects on Indian rights and sovereignty under United States law. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), Chief Justice Marshall, writing for the Court, noted that it was only "*the character and religion of its inhabitants*" that afforded Europeans "an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy." *Id.* at 573 (emphasis added). In *Johnson* and subsequent cases, Chief Justice Marshall was unwilling to enforce an enlarged version of the doctrine of discovery which purported to establish, by silent divesting operation of law, an absolute sovereignty and title over lands discovered by a European nation, simply because those lands were occupied by an Indian tribe.

Johnson is among the most important early decisions by the Supreme Court defining Indian rights and status under the doctrine of discovery. Two other decisions, also written

by Chief Justice Marshall, are *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In those seminal cases, the Chief Justice precisely delineated the minimal limitations on Indian rights and sovereignty "necessarily" required to effectuate the purposes of the discovery doctrine; *i.e.*, acquiring exclusive rights of territorial acquisition and colonial control over lands occupied by Indian tribes. The notion that the doctrine, as brought by European nations to North America, included an immunity on the part of the European discoverer from the exercise of tribal authority, was never discussed, or even acknowledged, in any of those cases. As Chief Justice Marshall recognized for the Court in *Worcester*, "the actual state of things" in colonial North America simply did not allow for the assertion of such an additional divestiture of tribal rights and sovereignty under the limited operation of the discovery doctrine. *Worcester*, 31 U.S. (6 Pet.) at 543.

Johnson offers the most extended discussion of the doctrine and its consequences for Indian sovereignty and rights under United States law. To avoid "conflicting settlements, and consequent war with each other," Chief Justice Marshall explained, the nations of Europe adopted a principle to regulate their "right of acquisition" in Indian-held lands. *Johnson*, 21 U.S. (8 Wheat.) at 573. "This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which might be consummated by possession." *Id.* He went on in *Johnson* to define two limitations on the "original inhabitants" of the lands claimed by the European nation. *Id.* at 574. First, the discovering European nation possessed "the sole right of acquiring the soil from the natives, and establishing settlements upon it." *Id.* at 573. Second, "[t]hose relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired

being exclusive, no other power could interpose between them." *Id.*

In the *Cherokee Cases*, the Court consistently reaffirmed these two extremely limited effects of the doctrine of discovery on Indian rights and sovereignty identified in *Johnson*. In *Worcester*, Chief Justice Marshall was writing for the Court in the midst of the constitutional crisis that gripped the nation,[23] and in the face of the State of Georgia's sweeping declarations (reminiscent of the *amici* states' position) of the discovery doctrine's effects on Indian sovereignty.[24] He nonetheless declared for the Court an even more restricted holding on the very narrow limitation upon Indian rights and sovereignty that necessarily flowed from adoption of the doctrine of discovery by the United States:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, *with the single exception* of that imposed by irresistible power, which excluded them from intercourse with any other European potentate that the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.

Worcester, 31 U.S. (6 Pet.) at 559 (emphasis added).

As this Court implicitly recognized in *Worcester*, conditions on the ground in North America during the early

---

[23] As former President John Quincy Adams declared, "the Union is in the most imminent danger of dissolution . . . The ship is about to founder." Albert J. Beveridge, 4 *The Life of John Marshall* 544 (1919).

[24] *See generally* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan. L. Rev. 500 (1969) (describing how the "Governor, legislators, and judges of Georgia had publicly dared the Supreme Court to interfere" with the state's asserted sovereign rights over the Cherokee Nation and its reservation).

colonial period simply did not permit or allow Great Britain to unilaterally assert and enforce as law any blanket immunities from tribal authority and control over tribally-held lands, regardless of the doctrine of discovery:

> It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Id. at 543.

In his powerfully evocative words—which hold particular relevance to the arguments of the petitioners and the *amici* states—the Chief Justice went on to conclude: "We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed light on existing pretensions." *Id.*

The actual state of things in the United States today—where Indian tribes are recognized and respected as a third sovereign by Congress, the Executive and this Court, and by the states themselves, see Part I.D, *infra*, exposes the absurdity of the assertions made by the petitioners and the *amici* states in support of establishing that tribes have been divested of authority over state officials who come onto tribal land and perform functions in relation to tribal members.[25]

---

[25] *See generally* Milner S. Ball, *Constitution, Courts, Indian Tribes*, 1987 Am. B. Found. Res. J. 1, 25-26 (observing that the doctrine of discovery as articulated by Marshall "has small consequences for tribes").

2. *The Court's Decision in Oliphant Does Not Provide a Basis for This Court to Establish an Additional Inherent Limitation on Tribal Authority on Indian-Owned Land.*

For nearly one hundred fifty years, this Court refused to extend the two limitations on tribal power under the European doctrine of discovery delineated by Chief Justice Marshall.[26] In 1978, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court announced a departure from Marshall's framework to allow the possibility of finding additional limitations on tribal power by virtue of discovery and incorporation into the territory of the United States. In *Oliphant* the Court held that, as a result of the conditions of their incorporation, "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Oliphant*, 435 U.S. at 208.[27] The Court established the principle that "Indian tribes are proscribed from exercising those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status*." *Id.* (emphasis supplied in original).

---

[26] The Chief Justice provided sound reasons for future courts to avoid any temptation to expand the artificial limitations imposed on Indian tribes by the European doctrine of discovery. In *Johnson*, he stated that the Court did not mean by its opinion "to engage in the defense of those principles which Europeans have applied to Indian title." *Johnson*, 21 U.S. (8 Wheat.) at 589. He stated a near identical view in *Worcester* on the legal validity of the theoretical rights asserted under the European discovery doctrine; "The extravagant and absurd idea, that the . . . settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man." *Worcester*, 31 U.S. (6 Pet.) at 544-545. Under the doctrine, he explained, "according to the common law of European sovereigns respecting America," the European discoverers "might rightfully convey . . . the exclusive right of purchasing such lands as the natives were willing to

The principle that tribes are implicitly divested of powers inconsistent with their status, however, should be interpreted as only a minor variation from the Marshall framework, a variation that does not provide for the additional finding of divested tribal powers that the petitioners advocate here. The more expansive interpretation of the principle of *Oliphant* advocated by the petitioners and the *amici* states must rely on the enlarged version of the doctrine of discovery that the Court eschewed early on. The Court in *Oliphant* expressly based its new implicit divestiture rule announced in that case upon the language and holding of *Johnson v. M'Intosh*: "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. 'Their rights to complete sovereignty, as independent nations [are][28]

---

sell. The crown could not understand to grant what the crown did not affect to claim; nor was it so understood." *Id.* at 545.

[27] Whereas *Oliphant* has met with much scholarly criticism, Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 Am. Ind. L. Rev. 353 (1994); Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater Than the Sum of the Parts*, 19 J. Contemp. L. 391 (1993); Milner S. Ball, *Constitution, Courts, Indian Tribes*, 1987 Am. B. Found. Res. J. 1, Mr. Hicks is not contesting the validity of *Oliphant*'s limited holding that Indian tribes do not possess criminal jurisdiction over non-Indians on the reservation under United States law. He only asks this Court not to extend the principle of *Oliphant* to the facts of this case, and establish an additional divestiture of inherent tribal civil jurisdictional authority over non-members or state officials on Indian owned and controlled land.

[28] Chief Justice Marshall's original language in *Johnson*, 21 U.S. (8 Wheat.) at 574 stated that the tribes' "rights to complete sovereignty, as independent nations, *were* necessarily diminished." (Emphasis added). The majority opinion's quotation of this sentence in *Oliphant* changes the verb "were" to "are," see *Oliphant*, 435 U.S. at 209, without any explanation for the change. The *Oliphant* Court's change, however,

necessarily diminished.' *Johnson v. M'Intosh*, (8 Wheat.) 543, 574 (1823)." *Oliphant*, 435 U.S. at 209.

The *Oliphant* majority opinion explained its specific holding of a limitation on tribal criminal jurisdiction by recognizing that the protection of territory within the external political boundaries of the United States (the precise protection afforded to the United States under the European doctrine of discovery as so held in *Johnson*, see Part I.C.1, *supra*), "is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation." *Id.* at 210. To this point, following Chief Justice Marshall's identification of the sovereign interests of the United States protected by the European doctrine of discovery, the *Oliphant* Court then went one step further and identified another central sovereign interest of the United States

---

should not be misread to significantly alter Chief Justice Marshall's meaning. Chief Justice Marshall was referring in this sentence only to the two specific tribal powers that "were necessarily diminished" as a result of the doctrine of discovery: the power to dispose of their lands to whomsoever the Indians pleased, and the power to enter into foreign alliances with any other European nation. *See Johnson*, 21 U.S. (8 Wheat.) at 574. All subsequent limitations on tribal rights and sovereignty, including the ultimate and exclusive right "to extinguish the Indian title of occupancy," as Chief Justice Marshall expressly stated in *Johnson*, were to be obtained by "purchase or by conquest." *Id.* at 587. The doctrine's effects, in other words, operated only in the past, at discovery, and those effects were quite limited. The doctrine, as Chief Justice Marshall's original language in *Johnson* clearly establishes, does not continue to affect the present rights and sovereignty of Indian tribes protected under United States law, beyond the rights necessarily divested under the doctrine. These "were" the rights to alienate their land without Congress' permission and the right to enter into alliances with foreign nations. All the other inherent tribal rights which survived operation of the doctrine, as *Johnson* makes clear, can only be diminished or extinguished subsequent to discovery by purchase or conquest, *i.e.*, by the exercise of Congressional plenary power.

protected by the doctrine's principle of diminished Indian sovereignty:

> But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty.

Oliphant, 435 U.S. at 209.

It was this overriding sovereign interest in protecting its citizens "from unwarranted intrusions on their personal liberty" that led the *Oliphant* majority to conclude that tribes had been implicitly divested of criminal jurisdiction over non-Indian United States citizens. *Id.* Nothing in the facts of the present case implicates the "personal liberty" interests of United States citizens to be free from the "unwarranted intrusions" of tribal criminal prosecution. The rationale and principle of *Oliphant* for building upon the limitations on tribal power that had been established long before simply do not apply here. No overriding sovereignty interest of the United States can be identified, akin to the possibility of the loss of personal liberty that is implicated in criminal prosecutions, to establish a blanket immunity for state officials from suit in tribal court.

The Court has in fact only applied the implicit divestiture principal of *Oliphant* in one situation outside of the criminal jurisdiction context, where Tribes have "retained no gatekeeping right" over lands on the reservation, and thereby "cannot assert a landowner's right to occupy and exclude." *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997); *see also Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993). In all of these cases, Congress had divested tribes of any purported right to

exclude non-Indians on the reservation lands at issue either by alienating the land to non-Indian fee-holders under the nineteenth century allotment acts (*Montana*), by taking tribal lands and broadly opening them up for public use (*Bourland*), or by authorizing the grant of a right-of-way easement over Indian lands for a state highway (*Strate*). The reason for applying *Oliphant's* implicit divestiture principle in these cases was stated precisely by the Court in *Bourland*; the implied limitation on tribal regulatory authority derived from the fact that in taking tribal lands for non-Indian uses, Congress had "eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Bourland*, 508 U.S. at 689.

The petitioners and the *amici* states point to no congressional act, treaty or mechanism divesting tribes of their "gatekeeping right" over the land at issue in this case. The Fallon tribal court in fact was exercising the very "gatekeeping right" which the tribe possesses as part of its inherent civil jurisdictional authority over tribal land recognized by United States law. Petitioners ask this Court to establish a new rule that extends far beyond the principle of *Oliphant*.

Ultimately, the argument for this Court to establish an additional divestiture of tribal authority over Indian-owned and controlled land on the reservation without Indian consent must derive its grounding, rationale and principle from the silent operation of a medievally-derived legal theory which this Court has applied previously only in a very limited fashion. Such a holding in this case would be inconsistent with modern notions of racial equality, this Court's prior decisions, and the protection of Indian rights and sovereignty guaranteed and promised under United States law through treaties and statutes, and should be rejected by this Court.

D. Needed Cooperation Between States and Tribes, Including in Matters of Law Enforcement, Would be Undermined by a Rule Preventing the Exercise of Tribal Court Jurisdiction Over State Officials.

Historically, for Indian tribes, "the people of States where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Only in recent times have tribes and states been able to find sufficient common ground in order to work cooperatively in governance matters of mutual concern. This cooperation is needed because of the existence of both tribes and states as sovereigns and the complex nature of human interaction that implicates their respective spheres of authority. Tribal-state cooperation has often been mandated by congressional action, but, increasingly, tribes and states have been able to find sufficient common ground and respect for each other's sovereignty to work cooperatively without a federal mandate. If, as the petitioners urge, state officials are granted blanket immunity from tribal jurisdiction, even for acts on reservation lands involving tribal members, the future of state-tribal cooperation, especially in law enforcement, could be seriously imperiled.

States and tribes have negotiated numerous cooperative agreements in critical areas of law enforcement, including but not limited to agreements for cross-deputization and extradition, inter-jurisdictional enforcement of warrants, subpoenas and other forms of legal process, provision of parole and probationary supervisory services, juvenile justice issues, enforcement of child support and custody orders, domestic relations law matters, domestic violence restraint orders, cross recognition of civil judgments, full faith and credit, mutual enforcement of traffic laws, and the sharing of records, information, reports and resources. David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., *Federal Indian Law: Cases and Materials* (4th ed. 1998).

Other cooperative agreements include a wide range of governance issues.[29]

A number of state governors and legislatures themselves have committed to cooperation with tribes.[30] The Conference of State Chief Justices has recognized the importance of tribal-state jurisdictional arrangements and has set to work implementing strategies to promote communication, cooperation and comity between state and tribal courts.[31] States have found cooperative agreements

---

[29] Such other agreements have covered issues of contract, tort and property laws, land rights, development and zoning, repossessions, taxation, economic development and infrastructure development, environmental issues, hunting and fishing regulations, and water rights. *Id.* In Oklahoma, for example, as of October 1999, the state and tribes had jointly created thirty-one tobacco regulation compacts, eleven compacts regarding gaming, twenty-four contracts regarding motor fuel, and one agreement regarding the Temporary Assistance to Needy Families (TANF) program. *See* Oklahoma Indian Affairs Commission, http://www.state.ok.us/~oiac/cca.html. *See also* Frank R. Pommersheim, *Tribal-State Relations: Hope For The Future?* 36 S.D. L. Rev. 239 (1991) (describing over eighty such tribal-state cooperative agreements in existence in more than a dozen states).

[30] For example, the Western Governors' Association has determined that, especially in rural areas, many problems faced by the states and tribes are the same and has begun projects between state governors, tribal chairmen, and interested groups to promote these mutual concerns. 1990 *Annual Report To The Western Governors' Association, A New Era For State-Tribal Relations* 14-18 (July 1990). *See also* So. Dak. C.L. § 1-24-1(1) (incorporating cooperation with tribes in the joint exercise of governmental powers statute); Ariz. Rev. Stat. § 9-461 (granting counties ability to enter into intergovernmental agreements with any tribes); 1984 Idaho Sess. Laws Ch. 72 and 119 (aa) (authorizing local governments and state and public agencies to enter into agreements with tribes for the concurrent exercise of powers and transfer of real and tangible property).

[31] Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 Judicature 154 (1995) (a specific recommendation is to "make intergovernmental agreements that provide for cross-utilization of facilities, programs, and personnel by state and tribal court systems"). *See also* Dennis Gibb, *Intergovernmental*

with tribes helpful in clarifying and simplifying the application of social policies and in aiding in the resolution of domestic disputes and issues surrounding religious practice. In some states this cooperation even extends to issues of mental health.[32] Nevada itself and its agencies have entered into a number of tribal-state cooperative agreements, passed relevant legislative enactments, and have experienced amicable relationships with tribes.[33]

Nevada's own cooperative agreements with tribes, as well as the hundreds of other such tribal-state agreements throughout the United States, reflect the reality that, contrary to the assertion of the petitioners, the current system of federalism does include tribes as a third entity. By virtue of acts of Congress and rulings from this Court, tribes are now ensconced within the federalism framework. In the words of Justice O'Connor:

> Today, in the United States, we have three types of sovereign entities—The Federal government, the states,

---

Compacts in Native American Law: Models for Expanded Usage, 112 Harv. L. Rev. 922 (1999).

[32] In Arizona, an involuntary commitment order from a tribal court is recognized as enforceable by any court of record in the state. *See* Ariz. Rev. Stat. § 12-136.

[33] *See, e.g.*, 1994 NEV. OP. ATTY. GEN. NO. 19, Indians; Jurisdiction: Criminal Law; Arrest: Tribal Authorities are authorized by state statute Nev. Rev. Stat. § 171.1255 to arrest non-Indians who violate state law in Indian country; 1991 NEV. OP. ATTY. GEN. NO. 3, Indians; Gaming; Liquor: Suggestion that the county enter into a cooperative agreement with the Fort Mojave Tribe to identify rights and obligations between the State and Tribal Law enforcement; 1980 NEV. OP. ATTY. GEN. NO. 42, Nevada Highway Patrol Jurisdiction on Indian Reservations; Nev. Rev. Stat. § 41.430 (no state civil jurisdiction unless tribes have consented); Nev. Rev. Stat. § 233A.010 (establishes Indian Commission); Nev. Rev. Stat. § 233A.130 (jurisdiction of administrative agencies not extended over Indian country without consent); 1985 Nev. Stat. Ch. 115 § 3 (tribal police authorized to make arrests outside reservation boundaries when the tribal officer is in fresh pursuit).

> and the Indian tribes. Each of these sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country.

O'Connor, J. *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1 (1997). Justice O'Connor's comments are timely within the contemporary reality of American society in which tribes play an important role.

If the petitioners are successful in achieving a blanket immunity for state officials from tribal jurisdiction, the developing framework of tribal-state cooperation could easily be crippled. The fair administration of justice and effective law enforcement for both Indians and non-Indians alike would be undermined by an asymmetrical jurisdictional rule providing state officials an absolute immunity from suit in tribal court, while leaving tribal officials exposed to suit in state courts. States and their officials may no longer see the need to negotiate cooperative agreements with the tribes if they are immunized for all actions in Indian country. Tribes also would be less likely to enter into negotiations or uphold current obligations if the reality were that the state party or its agents could in fact be completely immune from any review and monitoring power by tribes and their courts. The potential destabilization of cooperative agreement-making, in addition to significantly decreasing the likelihood of reaching mutually satisfactory solutions to both state and tribal communities, would also weaken tribal governments and self-determination in direct contrast to this Court's stated recognition and encouragement for tribal sovereigns.

II. INDIVIDUAL IMMUNITY CLAIMS RAISED BY THE STATE OFFICIALS SHOULD FIRST BE ADJUDICATED IN TRIBAL COURT.

While the petitioners' assertion of sovereign immunity does not pose a bar to the jurisdiction of the tribal court as a matter of federal law, the individual petitioners may raise personal immunity defenses to Mr. Hicks' causes of action.

These immunity defenses should be adjudicated in the Fallon Tribal court prior to any federal court intervention. The district court and court of appeals were correct to refrain from ruling on the petitioners' individual immunity defenses and to require instead that the claims be adjudicated first by the tribal court. Having only confronted the petitioners' individual immunity defenses in the context of their motion to quash service of process, the tribal court has not yet had the occasion to evaluate the facts that are relevant to an entitlement of immunity, nor to examine the precise contours of the relevant tribal or federal law. Likewise, Mr. Hicks has not had the opportunity to fully discover and confront the facts that might be alleged to support immunity in the face of his own allegations of malicious intent, bad faith, and conduct beyond the scope of lawful authority.

Only if this Court were to agree with the petitioners' far-reaching assertion that, as matter of federal law, state officials are entitled to an extraordinary absolute immunity merely upon a showing of official status, might federal intervention be permissible without allowing Mr. Hicks the opportunity to confront the petitioners' immunity defenses in tribal court. As discussed above, such blanket immunity for state officials is not justified for the purposes of jurisdiction and would be unprecedented for a personal immunity defense.

In the absence of such blanket federal law immunity, the petitioners' efforts to bypass the tribal forum and have their immunity defenses determined in the first instance by a federal court should not be allowed to succeed. The determination of the petitioners' immunity defenses, particularly in regard to the tribal law claims, "will require a careful study of the application of tribal law, and tribal court decisions," *Stock West Corp. v Taylor,* 964 F.2d 912, 920 (9th Cir. 1992) (holding district court abused discretion by failing to stay its hand on immunity issue prior to tribal court resolution of question). As a general matter, great deference

should be accorded tribal courts in the application of tribal law. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

The presence of federal law issues in this case, or the potential availability of immunity defenses under federal law in connection with Mr. Hicks' § 1983 claims, does not justify any federal court intervention prior to adjudication of the immunity defenses by the tribal court. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485 n.7 (1999) ("the existence of federal preemption defenses in the more usual sense would [not] affect the logic of tribal exhaustion" because, "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law"); *Landmark Golf, Ltd. v. Las Vegas Paiute Tribe*, 49 F. Supp. 2d 1169, 1174-75 (D. Nev. 1999) (tribal court exhaustion required for federal law claim) (citing *United States v. Plainbull*, 957 F.2d 724, 726-28 (9th Cir. 1992)). In cases such as this, where the dispute involves a reservation matter, comity concerns "almost always dictate that the parties exhaust tribal remedies before resorting to a federal forum." *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1378 (10th Cir. 1993).

This Court has held that, with few exceptions, tribal court remedies must be exhausted before the federal courts rule on the jurisdiction of tribal courts. *See National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-57 (1985); *Iowa Mutual*, 480 U.S. at 15-16. The doctrine of exhaustion of tribal court remedies is based on sound federal policy of deference to tribal courts. *Iowa Mutual*, 480 U.S. at 16. This Court's recognition of the pivotal role that tribal courts play in furthering tribal self-government has included its observations that the doctrine of tribal court exhaustion is further strengthened by the need for tribal courts to "provide other courts with the benefit of their expertise in the event of further judicial review," *National Farmers*, 471 U.S. at 857, and the concern that "unconditional access to a federal forum would place it in direct competition with the tribal courts,

thereby impairing the latter's authority over reservation affairs." *Iowa Mutual*, 480 U.S. at 16 (citations omitted).

The same prudential considerations that require exhaustion of tribal remedies in the context of determining jurisdiction extend to tribal court deliberations more generally. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000) (requiring tribal court exhaustion of contract claims between Rhode Island corporation and tribal agency); *Kerr-McGee v. Farley*, 115 F.3d 1498 (10th Cir. 1997) (deferring tribal court jurisdiction as to claims under Price Anderson Act and noting that exhaustion must include tribal appellate remedies); *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992) (requiring tribal court exhaustion in suit by United States for trespass penalties under 25 U.S.C. § 179); *Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1992) (requiring tribal court exhaustion as to a federal civil rights claim based upon allegedly unconstitutional conduct by the defendants in securing the plaintiff's arrest, indictment, prosecution, federal court conviction); *A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986) (requiring tribal court exhaustion as to claim maintained under 42 U.S.C. § 1983 against state and tribal officials). Further, "as a general rule, if a tribe has not explicitly waived exhaustion, courts lack discretion to relieve its litigation adversary of the duty of exhausting tribal remedies before proceeding in a federal forum." *Ninigret Dev. Corp.*, 207 F.3d at 32 (citations omitted). No such waiver has occurred in regard to the present case.

The Fallon tribal court is available to adjudicate Mr. Hicks federal and tribal law claims, as well as the petitioners' immunity defenses to those claims. It should be permitted to do so, so that Mr. Hicks may finally have his day in court.

CONCLUSION

Although historically excluded, hundreds of tribes are part of the fabric of this country. Their courts should be accorded the same dignity that is extended to the courts of the more recent sovereigns of the land. And Mr. Hicks should be allowed to pursue his claims in the Fallon tribal court, without being subject to novel jurisdictional constraints that would apply only to the courts of the country's first peoples. For all the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:
JULIE ANN FISHEL
Winthrop & Weinstine, P.A.
30 E. Seventh Street
St. Paul, MN 55101
(651) 290-8458

JENNIFER K. HARVEY
Holland & Hart LLP
555 Seventeenth Street
Denver, CO 80202
(303) 295-8244

S. JAMES ANAYA
Counsel of Record
ROBERT A. WILLIAMS, JR.
Indigenous Peoples Law
And Policy Program
The University of Arizona
James E. Rogers
College of Law
1201 E. Speedway
Tucson, AZ 85721-0176
(520) 626-6341

FEB 23 2001

Supreme Court, U.S.
FILED
FEB
OFFICE OF THE CLERK

No. 99-1994

IN THE
Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,
Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

FRANKIE SUE DEL PAPA
Attorney General of the State of Nevada
C. WAYNE HOWLE
(*Counsel of Record*)
Senior Deputy Attorney General
PAUL G. TAGGART
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1227

Of Counsel:
JEFFREY S. SUTTON
Jones, Day, Reavis & Pogue
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

A. Nevada's Immunity From Suit Precludes Tribal Claims Against State Officials In Tribal Court . . . 1

B. Respondents Cannot Bring Their Section 1983 Claim Against State Officials In Tribal Courts . . . 6

C. The Expedience of Naming State Officials In Their Individual Capacity Does Not Alter These Principles 7

D. State-Tribal Cooperation Will Not Be Advanced By Respondents' Claims 11

E. The Plight Of William Molini Illustrates The Risks of Adopting the Ninth Circuit's Approach To Deciding Issues of Qualified Immunity 13

F. Even If State Immunity Itself Does Not Defeat Tribal Jurisdiction, No Such Jurisdiction Exists In This Case Under *Montana v. United States* . . 16

1. Respondents overstate the relevance of several precedents 16

2. In respectfully seeking approval of the warrant from the tribal court, the officers did not consent to jurisdiction 18

3. Inability to sue state officials does not affect tribal sovereignty 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Alden v. Maine, 527 U.S. 706 (1999) 1, 6, 8, 10
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 6
Baker v. McCollan, 443 U.S. 137 (1979) 15
Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343 (2d Cir. 2000) 13
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 1
Boisclair v. Imperial Granite Co., 51 Cal. 3d 1140 (Cal. 1990) 13
BMW of N. America, Inc. v. Gore, 517 U.S. 559 (1996) 12
Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 1, 2, 5
Claflin v. Houseman, 93 U.S. 130 (1876) 10
College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219 (1999) 2
Denver Area Education Telegraph Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 2
Draper v. United States, 164 U.S. 240 (1896) 18
Drumm v. Brown, No. CV960079971, 1999 Conn. Super. LEXIS 1691 (Conn. Super. Ct. 1999) 13
Duro v. Reina, 495 U.S. 676 (1990) 17
El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 7, 17
Hafer v. Melo, 502 U.S. 21 (1991) 9
Hegner v. Dietze, 524 N.W.2d 731 (Minn. App. 1994) 13
Howlett v. Rose, 496 U.S. 356 (1990) 10
Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) 9
Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) .. 7, 17

TABLE OF AUTHORITIES (cont'd)

Page

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) 17
Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) 14
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 9
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 17
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 18
Montana v. United States, 450 U.S. 544 (1981) 16
Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) 7, 10, 14, 17
Nevada v. Hall, 440 U.S. 410 (1979) 4, 5
Nevada v. Hicks, 196 F.3d 1020 (9th Cir. 1999) ... 11, 14
New York ex rel. Ray v. Martin, 326 U.S. 496 (1945) 18
Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) 13
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 2, 17
Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 18
Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) 9
Perez v. Ledesma, 401 U.S. 82 (1971) 9
Petersburg Cellular Partnership v. Board of Supervisors of Nottoway Co., 205 F.3d 688 (4th Cir. 2000) 10
Printz v. United States, 521 U.S. 898 (1997) 10
Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) .. 14, 16
Richards v. Harper, 864 F.2d 85 (9th Cir. 1988) 19

TABLE OF AUTHORITIES (cont'd)

Page

Richardson v. McKnight, 521 U.S. 399 (1997) 6
Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 7, 12, 13
Snooks v. Ninth Judicial District Court,
919 P.2d 1064 (Nev. 1996) 20
Strate v. A-1 Contractors, 520 U.S. 438 (1997) 17
The Schooner Exchange v. McFaddon,
11 U.S. (7 Cranch) 116 (1812) 5
Texas v. White, 74 U.S. 700 (1869) 4
Turner v. Martire, 99 Cal. Rptr. 2d 587
(Cal. Ct. App. 2000) 13
United States v. Plainbull, 957 F.2d 724
(9th Cir. 1992) 7
United States v. Tsosie, 92 F.3d 1037
(10th Cir. 1996) 7
Washington v. Confederated Tribes of Colville
Reservation, 447 U.S. 134 (1980) 17
White Mountain Apache Indian Tribe v. Shelley,
480 P.2d 654 (Ariz. 1971) 13
Williams v. Lee, 358 U.S. 217 (1959) 17, 20
Worcester v. Georgia, 31 U.S. (6 Pet.)515 (1832) 5
Ex parte Young, 209 U.S. 123 (1908) 9

Constitutional and Statutory Provisions

Nev. Const. art. 5, § 21 12
Indian Civil Rights Act, 25 U.S.C. §§1301-1341 7
25 U.S.C. § 1323(a) 20
28 U.S.C. § 1441 11
28 U.S.C. § 1442(a) 19
PUB. L. 83-280, 67 Stat. 588 .....
NEV. REV. STAT. § 41.0349 12
NEV. REV. STAT. § 41.035 12
NEV. REV. STAT. § 41.430 20

TABLE OF AUTHORITIES (cont'd)

Page

NEV. REV. STAT. §§ 277.080-277.180 12

Miscellaneous Authorities

American Indian Law Deskbook (2d ed. 1998) 20
Documents of United States Indian Policy,
(Francis Paul Prucha ed., 3d ed. 2000) 3
Pub. L. 83-280, 67 Stat. 588, *as amended*,
18 U.S.C. 1162, 28 U.S.C. 1360 13
The Federalist No. 32 (Alexander Hamilton)
(Clinton Rossiler ed., 1961) 10
The Federalist, No. 45 (James Madison)
(Clinton Rossiler ed., 1961) 4

REPLY BRIEF FOR PETITIONERS

A. Nevada's Immunity From Suit Precludes Tribal Claims Against State Officials In Tribal Court.

Petitioners showed in their opening brief (Pet'r Br. 9-13) that all States, Nevada included, entered the Union with their sovereignty intact. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). One component of that sovereignty is that a State generally has authority to decide when and where the government and its officials will be sued save when the Constitution delegates to another sovereign the authority to abrogate those immunity rules. *Alden v. Maine*, 527 U.S. 706 (1999). In this instance, Nevada has granted carefully-delimited waivers of immunity for official conduct of state employees. By their terms, however, these waivers do not extend to Mr. Hicks' tribal-court claims brought under tribal law.

In trying to evade these immunity requirements, Mr. Hicks has not pointed to any cognizable source of authority for preempting, abrogating or otherwise nullifying what Nevada law requires. Nor is it inherent in the Tribes' status as domestic dependent nations. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). To the contrary, any exercise of judicial power over state officials is inconsistent with the dependent status of Tribes, and accordingly any such power—if it ever existed—was divested by the plan of the convention. Therefore, in the absence of any showing that Nevada has either consented to suit in tribal court, or that Congress has abrogated state immunity by a clear statement and in accordance with a permissible exercise of constitutional authority, the State's immunity rules bar tribal jurisdiction over Mr. Hicks' tribal law claims.

Mr. Hicks does not argue that Nevada has consented to suit in tribal court. And he does not argue that Congress has properly invoked the Indian Commerce Clause or any other

source of constitutional authority to preempt Nevada's immunity rules regarding claims against the government or its officials. Instead he and the tribal respondents principally criticize the Framers' understanding of State sovereignty as well as the principle of State sovereignty itself, then weave together a claim that federal policy in this area has evolved to supersede these original understandings regarding the allocation of power among the United States, the individual States, and the Indian Tribes. *See, e.g.*, Hicks Br. at 31-37, Brief *Amici Curiae* of Confederated Tribes of the Colville Reservation, et al., at 17-21; Brief *Amici Curiae* of the Pyramid Lake Paiute Tribe of Nevada, et al., at 10-14.

Arguments of this sort, however, explain why sovereign immunity is a constitutional doctrine, supplying it with the "starch" it needs to resist momentary changes in public opinion. *Cf. Denver Area Educ. Tel. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring). "[S]tate sovereign immunity, unlike foreign sovereign immunity, is a *constitutional* doctrine that is meant to be both immutable by Congress and resistant to trends." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2231 n.4 (1999). Trends in federal Indian policy thus cannot affect state immunities in tribal courts, just as they cannot alter federal immunities in tribal court. Short of a permissible abrogation of state immunity, modern statutory policies regarding Indian Tribes do not inform the meaning of state immunity; only the terms of the Constitution (and the original understanding of it) may do that.

Instead of advancing their position, respondents' oblique criticism of the Framers' vantage point ultimately confirms the implausibility that the Constitution envisioned tribal court actions against state officials. The founders, in point of fact, never contemplated tribal involvement in any court, much less tribal courts. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831); *Oliphant v. Suquamish Indian Tribe*, 435 U.S.

191, 196-97 (1978). *See generally Documents of United States Indian Policy* (Francis Paul Prucha ed., 3d ed. 2000) ("Prucha").[1]

Time of course has a way of making these early views, and others that are even less charitable,[2] seem hard to fathom today. And of course the State's reference to this shared understanding of the meaning of the Constitution is not meant to signal a modern-day endorsement of these views. But the

---

[1] *See, e.g.*, Prucha, at 31 (Statement to the House of Representatives submitted by Secretary of War Calhoun on December 5, 1818) (Eventually Indian Tribes will "be permitted to participate in such civil and political rights as the respective States within whose limits they are situated might safely extend to them"); *id.* at 47 (first annual message to Congress by President Jackson, December 1829) ("The Constitution declares that 'no new State shall be formed or erected within the jurisdiction of any other State, without the consent of its legislature. *If the General government is not permitted to tolerate the erection of a confederate State within the territory of one of the members of this Union against her consent, much less could it allow a foreign and independent government to establish itself there.*'") (emphasis added).

[2] *See, e.g.*, Prucha, at 22 (Letter from President Jefferson to William Henry Harrison, dated February 27, 1803) ("[tribes] will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi . . . . we presume that our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them, and that all our liberalities to them proceed from motives of pure humanity only"); *id.* at 22 (statement of Secretary of War Calhoun to House of Representatives, dated December 4, 1818, ("Our laws and manners ought to supersede their present savage manners and customs"). Respondents and supporting amici also cite Congress' recent generous statements about tribal adjudicatory jurisdiction as support for their case. *See, e.g.*, Brief *Amici Curiae* of Pyramid Lake Paiute Tribe, et al., at 11-14. Omitted, though, from the legislative statements is any indication that Congress believes tribal courts may wield their jurisdiction against state officials. One might reasonably suppose that Congress would have signaled its intent to work such a radical adjustment had it in fact intended this change.

answer to this evolving perspective on the proper role of Indian Tribes in modern America and to the earnest desire to establish tripartite comity among Tribes, States and the Federal Government is not to alter bedrock understandings about the meaning of the Constitution. It rather is to develop properly-exercised federal and state statutes that account for these important developments. It is the role of state and federal legislatures alike to put these modern attitudes about Indian Tribes into positive law. And in many respects, they have done just that. When it comes to these claims, however, neither the Congress nor the Nevada legislature has legislated that Indian claimants may receive superior treatment to other Nevada residents when it comes to claims against the State or its officials.

Nor, contrary to one of the respondents' claims, does the State contend that Tribes are not sovereigns. *See* Brief *Amici Curiae* of the Pyramid Lake Paiute Tribe, et al., at 10. They simply are a different kind of sovereign. Much as counties and cities are limited sovereigns under state law, so Indian Tribes are limited sovereigns under federal law. Nothing about that limited sovereign status, however, gives Indian Tribes inherent authority to sue state officials in tribal court under tribal law. Neither has Congress ever delegated such an extraordinary grant of power to them.

Mr. Hicks' extended discussion of *Nevada v. Hall*, 440 U.S. 410 (1979), serves only to underscore the inapposite nature of Respondents' attempt to wedge tribes into the relationship that exists between States and the Federal Government, and among the States themselves. Hicks Br. at 24-30. The States came to the Union as full sovereigns. Indeed, the Union exists only by virtue of their willingness to cede voluntarily a portion of that sovereignty. *See Texas v. White*, 74 U.S. 700, 724-25 (1869); The Federalist No. 45, at 260 (James Madison) (Clinton Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal

government are few and defined. Those which are to remain in the State governments are numerous and indefinite"). It was this full complement of sovereignty that permitted the majority in *Hall* to analogize Nevada and California to "independent and completely sovereign nations," 440 U.S. at 417, and thereby to make Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), pertinent. Indian Tribes, in contrast, were dependent sovereigns possessing no inherent authority as to the States at the time of the Constitution's framing and necessarily had no sovereignty to contribute to the federal Union.

Equally unpersuasive is Hicks' effort to render the discovery doctrine of no present significance. *See* Hicks Br. at 31-37. While Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542 (1832), contrasted the discovery doctrine's theoretical basis with the "actual state of things" in preempting the State of Georgia's effort to apply its law to persons within the Cherokee Nation's lands, it nonetheless remains indisputable—and undisputed by Hicks himself—that the doctrine served as the basis for the Court's characterization of tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831). The question whether state law is preempted, moreover, differs qualitatively from whether a Tribe possesses inherent authority as to a State. The first question turns on the scope of congressional power as *delegated* by the States to Congress; the second turns on whether the "domestic dependent nation" status of Tribes negates any claim to inherent authority over not only the United States but also the States, since the Federal Government's plenary power over Indian affairs derived from the States themselves.

In the final analysis, respondents simply have not identified any tenable source of authority—whether in the Constitution, federal law, or inherent in their status as limited sovereigns—for ignoring (in truth, preempting) Nevada's laws

regarding suits against state officials. Absent such a cognizable theory of superior power, the tribal claimants must do what all Nevada residents must do—seek relief in state or federal court.

B. Respondents Cannot Bring Their Section 1983 Claim Against State Officials In Tribal Courts.

Also unavailing is respondents' section 1983 claim. As Nevada showed in its opening brief (Pet'r Br. 24-29), Congress did not *expressly* create any such action against state officials in tribal courts, as required when it attempts to alter "the constitutional balance between the Federal Government and the States." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). And at any rate it lacked the power to create such a claim. *See* Pet'r Br. 27-29. The tribal claimants offer several responses to these arguments, all unpersuasive.

As an initial matter, it bears emphasis that respondents have not offered a shred of historical evidence that the Congress that passed section 1983 meant to allow such claims in tribal court against non-consenting state officials. No such evidence exists, and that is presumably why respondents suggest that congressional intent is not even relevant to the issue at hand. *See* Fallon Tribe Br. at 45. On this basis alone, the claim should be dismissed.

Nor have respondents been willing to consider the questions the Court has asked in the past in deciding whether to extend section 1983 to new settings and new claims—specifically, the "history" and special "policy concerns" involved in suing government officials. *Richardson v. McKnight*, 521 U.S. 399, 404 (1997). *See* Pet'r Br. at 25-29. No such consideration has been offered; and none could be offered given the "anomalous and unheard-of proceedings" that respondents propose. *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quotation omitted). The claims have no pedigree, and as the facts of this case well illustrate they are more apt to interfere with State-Tribal relations than advance them.

Instead, respondents argue simply that Tribes are sovereigns and as such tribal courts by definition must be competent tribunals for section 1983 actions. *See* Fallon Tribe Br. at 45-46. Even if tribal courts may be competent to hear certain federal claims, however, that does not mean Congress authorized them to hear section 1983 claims. And as shown (Pet'r Br. 25), the language of the statute says not a word about tribal courts.

Respondents also rely on a number of decisions holding that tribal courts may apply certain federal laws. Fallon Tribe Br. at 45-46. But the vast majority of these cases involve federal statutes designed by their terms specifically for Indian Tribes.[3] The only federal law involved in two other cases—*National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)—is simply the tribal courts' authority initially to rule on their own jurisdiction (which itself is a federal question) over private individuals who are not members of the Tribe. That respondents feel compelled to rely on these inapt precedents merely confirms the difficulty of obtaining traction on this contention. The argument should be rejected.

C. The Expedience of Naming State Officials In Their Individual Capacity Does Not Alter These Principles.

In response to all of this, the tribal claimants primarily claim that pleading rules defeat Nevada's contentions. Just as

---

[3] *See United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992) (action for penalties against member grazing livestock on tribal land without a tribal permit); *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996) (ejectment and trespass action on behalf of a Navajo tribal member against another member); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999) (by its reference to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). *El Paso's* reference pertains to civil rights claims against tribal officials in tribal court, under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341).

precedent allows individual-capacity actions under section 1983 against state officials in federal court, they argue that similarly-styled actions may be brought in tribal court under tribal law and section 1983. Their reliance on this point is undifferentiated, and purportedly justifies all of Mr. Hicks' claims, whether in common-law tort, federal civil rights, or tribal civil rights. That is wrong.

To start with, no rule of pleading with which we are familiar allows a plaintiff to innovate a claim that the legislature did not. Here, as we have shown, no tenable evidence exists that Congress meant to create a section 1983 claim enforceable in tribal courts, which after all did not even exist when the statute was enacted. Nor, as we also have shown (Pet'r Br. 22-23), did the Tribe expressly establish a tribal-law claim against State officials. Respondents offer no answer to the latter point, and conclusory responses to the former.

No less fundamentally, the nullification of state immunity rules is not a matter of pleading creativity. Just as state residents may not bring state-law actions against state officials in disregard of Nevada immunity law merely by naming them in their individual capacity, neither may tribal claimants do the same under tribal law or section 1983. The one is no less disrespectful of Nevada law than the other.

Nor are these types of actions inconsequential. With a wide array of statutes and constitutional provisions to back her up, Nevada's Attorney General asserts, categorically, that vital state interests are implicated by the tribal-court actions. Having defended the state officials from the inception, she can fully attest that these types of actions threaten States' financial integrity, permit intervention in the processes of government, interfere with the allocation of scarce resources, and pose real threats to Tribal-State relations. *See Alden v. Maine*, 527 U.S. 706, 749-51 (1999). These state peace officers after all were sued because they investigated an off-reservation state crime, allegedly committed by a Nevada citizen located within the

State's boundaries. And Nevada's Wildlife Director was sued, and kept in the litigation for ten years, without any allegation ever being brought against him.

In response to the State's sovereign defense, the tribal respondents attempt to parlay federal doctrine permitting suits against individually-named officials into new, expansive tribal jurisdiction. No doubt the State accepts *Ex parte Young*, 209 U.S. 123 (1908), *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), *Hafer v. Melo*, 502 U.S. 21 (1991), among other decisions. But the extension of these decisions to tribal-court claims under tribal law and section 1983 should be flatly rejected. Not one of these cases or any other offers a coherent explanation for extending this Court's individual-capacity doctrine to claims in tribal court, as opposed to federal court. Still less is there any basis for doing so with regard to claims brought under tribal law. As we showed in the opening brief (Pet'r Br. 20-22, 27-29), these creative claims parallel an earlier effort to extend *Ex Parte Young* actions to claims brought under state law against States in federal court. For many of the same reasons that the Court rejected this effort to circumvent state immunity rules in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), it should do so here. The explanation for creating these federal-court, federal-law doctrines, together with the *ultra vires* fictions on which they rested, simply does not translate to this setting. *See id.* at 105 ("*Ex Parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution") (quoting *Perez v. Ledesma*, 401 U.S. 82, 106 (1971); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) ("Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.").

Howlett v. Rose, 496 U.S. 356 (1990), is not to the contrary. It rested at most on the constitutional integration of state and federal courts. *Id.* at 367. Tribal courts, in contrast, lack *any* constitutionally-grounded role, and the rationale of *Howlett* should have no force with regard to them. Indeed, the very purpose of those courts is to enforce a Tribe's inherent authority which, as this Court has reiterated regularly, derives from sources wholly independent of the federal constitutional and statutory regime that section 1983 attempts to vindicate. *See, e.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). Neither the extension of section 1983 actions to tribal courts nor the extension of personal immunity principles to tribal courts will further the important national objectives that explain the development of these extraordinary federal-court doctrines.

Respondents and their *amici* deal with the federal structure of the Constitution and its bilateral allocation of power by denying its existence. The Fallon Tribe suggests that "traditional analysis has always relied heavily on the Constitution's recognition of three sovereigns," Fallon Tribe Br. at 32, and the United States implies the same by its reference to tribes and States as "concurrent sovereigns."[4] U.S.

---

[4] The United States misapplies the term "concurrent sovereigns" to denote Tribes and States. The term is traditionally used with reference to state and federal governments. *See Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway Co.*, 205 F.3d 688, 700 (4th Cir. 2000) (quoting *Printz v. United States*, 521 U.S. 898 (1997), and citing *Alden v. Maine*, 527 U.S. 706 (1999), to explain that the "dual-sovereignty structure of the Constitution carefully preserves two, concurrent sovereigns over the people"); *see also The Federalist* No. 32, at 169 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("[t]he necessity of a concurrent jurisdiction results from the division of sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor is not only a theoretic consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution").

Br. at 1 and 18. Hicks asserts that, "[b]y virtue of acts of Congress and rulings from this Court, tribes are now ensconced within the federalism framework." Hicks Br. at 45. But these bald assertions are mistaken, and utterly unsupported.

Perhaps the best evidence of the novelty of these claims is the extraordinary lengths to which the United States has gone to soften their impact. Having first ignored two centuries of history, tradition and practice, to say nothing of the plain language of the relevant laws, in order to support these innovations, the Federal Government attempts (U.S. Br. 24-30) to undo the impact of this striking departure from settled practices by rewriting the removal statute. In the Federal Government's view, the new susceptibility of state officials to tribal-law and section-1983 claims in tribal courts will not amount to much because States may remove the federal claims (and pendent tribal claims) to federal court under 28 U.S.C. § 1441. The problem is, section 1441 says not a word about removal from tribal courts. It mentions only removal from "a State court." 28 U.S.C. § 1441. Rather than presenting one more hurdle for the United States to clear in developing a theory that offers something to everyone, this language suggests something else—that Congress thought general federal-law claims could not be brought in tribal court in the first instance. The Federal Government's contention fails to account for this straightforward interpretation of the removal statute and in the end should be rejected.

D. State-Tribal Cooperation Will Not Be Advanced By Respondents' Claims.

In urging tribal jurisdiction over state officials, Mr. Hicks relies on the surprising contention that it will foster cooperation between States and Tribes. Hicks Br. at 43; *see also* Fallon Tribe Br. at 11. The authorities presented, however, do no more than demonstrate the level of cooperation that occurred before the Ninth Circuit's opinion in this matter. *See Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 1999). Doubtless, Nevada,

like many States, has encouraged cooperation between Tribes and state agencies. *See, e.g.*, NEV. REV. STAT. §§ 277.080 to 277.180. But the Ninth Circuit's decision puts these arrangements in jeopardy; it will not further them.

The existence of tribal jurisdiction here, for example, will cause great consternation for States and their employees who must perform law-enforcement activities relating to Indian affairs. Not only will these employees be forced to engage in activities that will expose them to new liabilities, but those liabilities will arise under laws and before tribunals that are not constrained by ordinary constitutional limitations and are not subject to external review.[5] For their part, Tribes will be reluctant to enter into cooperative arrangements that would voluntarily diminish the reach of their inherent powers in order to allay State concerns. State-tribal cooperation is far more likely to suffer than flourish if the Ninth Circuit's novel approach is accepted.

Nor is it true that "state courts have adjudicated state law claims against individually named tribal officials." Hicks Br. at

---

[5] Though it is true that Nevada, for example, will indemnify its employees for judgments against them arising from actions taken in the course and scope of their duties, NEV. REV. STAT. § 41.0349, the state legislature has also decided that no award for punitive damages may be taken against the State. NEV. REV. STAT. § 41.035. Reconciliation of these disparate provisions is then left primarily to the State Board of Examiners, *see* Nev. Const. art. 5, § 21, to decide as a political question whether a state official may be indemnified for a punitive award. The ambiguity of the law can result in uncertainty for state employees. While this concern is tempered to some extent outside the tribal court system by the Due Process Clause of the Fourteenth Amendment and the availability of, *inter alia*, this Court's review (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)), no such assurance exists with respect to tribal court proceedings even if 25 U.S.C. § 1302(8) is construed to impose comparable limitations on tribal court judgments. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

20. While several decisions are offered to support the statement, *id.* at n.9, they do not in fact do so. For example, the issue was left unresolved in *Drumm v. Brown*, No. CV960079971, 1999 Conn. Super. LEXIS 1691, at *8 (Conn. Super. Ct. 1999). And *Hegner v. Dietze*, 524 N.W.2d 731, 735 (Minn. App. 1994), *Boisclair v. Imperial Granite Co.*, 51 Cal. 3d 1140 (Cal. 1990), *Drumm*, 1999 Conn. Super. LEXIS 1691, at *10, and *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971), all originated in Public Law 280 States. There, unlike here, the power of the State to supply the rule of decision is uncontested; i.e., presently, the issue is not merely immunity from suit but from the very authority of the Tribe to impose its inherent authority on Nevada or its representatives charged with carrying out the State's sovereign responsibilities. Pub. L. 83-280, 67 Stat. 588, *as amended*, 18 U.S.C. § 1162, 28 U.S.C. § 1360. Likewise, *Santa Clara Pueblo*, and *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000), involved federal, not state, jurisdiction. Lastly, the Court's general statement in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("[w]e have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State") supplies no standard to explain when and why such actions may be maintained. Respondents' contention also ignores an equal, if not greater, number of decisions that have dealt differently with tribal officials' immunity. *See* Pet'r Br. at 12. *See also Turner v. Martire*, 99 Cal. Rptr. 2d 587 (Cal. Ct. App. 2000) (tribal officials lose protection of tribal immunity if their actions were taken for their personal benefit).

E. The Plight Of William Molini Illustrates The Risks of Adopting the Ninth Circuit's Approach To Deciding Issues of Qualified Immunity.

As petitioners also demonstrated in their opening brief (Pet'r Br. 29-33), the Ninth Circuit erred in concluding that

petitioners' sovereign immunity defense is not jurisdictional, *see Nevada v. Hicks*, 196 F.3d 1020,1029, n.12 (9th Cir. 1999), and in failing to ensure that it was addressed at the outset. *See P. R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Petitioners also showed that if they cannot invoke the State's own immunity for their protection, they ought to be entitled to a form of qualified immunity that is jurisdictional in effect and that must be assessed by a federal court if not promptly decided in tribal court. The prudential considerations that normally require exhaustion in tribal court, *see National Farmers Union Ins. Cos.*, 471 U.S. 845 (1985), simply do not apply to immunity defenses raised by state officials in tribal courts.

The experience of one of the individual petitioners in this case fairly illustrates the reasons for this rule. William Molini was the Director of the Nevada Department of Wildlife in 1991 when Mr. Hicks sued him in tribal court. Mr. Hicks did not allege then, and has not alleged since, that Molini did anything wrong. "Petitioner Mr. Molini," it has now been acknowledged, "does not appear from the record to have acted personally within Indian country." Brief *Amici Curiae* for the Thlopthlocco Tribal Town, et al., at 2, n.2. While neither of the respondents specifically addresses Mr. Molini's continued presence in this matter, they now appear to concede that he should not have been named. *See* Hicks Br. at 3, n.2 ("On or about January 18, 2001, Mr. Hicks filed motions in both cases before the tribal court . . . to drop William Molini as a defendant"). This eleventh-hour development merely reflects the fact that naming Molini as a party was unfounded from the outset. Yet neither the federal nor tribal courts addressed the injustice, even though it was plainly presented. Only the risk of a negative outcome in this Court apparently has led respondents to do what should have been done at the outset.

Remarkably, despite the ten years it has taken to extract Mr. Molini voluntarily from the case, respondents still want more time in tribal court to address the question of qualified immunity. Brief of the Fallon Tribe at 42; *see also* Hicks Br. at 46-49; Brief *Amicus Curiae* of the Pyramid Lake Paiute Tribe at 27-28. In their view, the "factual context [involved in the qualified immunity defense] was never developed in the Tribal Court." Brief of the Fallon Tribe at 42.

But what "factual context" could there still be to develop? No such issues needed to be developed for Mr. Molini, as all apparently now agree. His defense was a challenge to the face of the complaint, not to the underlying facts. The same is true for the other individual petitioners. Their challenge arose from the four corners of the complaint, and their entitlement to relief was self-evident. To its credit, the United States recognizes as much:

> Hicks is seeking to hold petitioners liable in tort simply for executing, in accordance with their terms, facially valid search warrants that were issued by the state court and approved by the tribal court. . . . [S]uch conduct would fall well within the scope of the applicable immunity, whatever its precise boundaries.

U.S. Br. at 21; *see also* Brief *Amici Curiae* for the Thlopthlocco Tribal Town, et al., at 2 n.2. The State of Nevada has been making this precise argument for ten years now, all to no avail. The *Bleak-House* manner in which this case has been handled illustrates, first, why these actions should not be allowed in the first instance, and, second, why if they are allowed, qualified immunity defenses should be treated as jurisdictional in nature under *Puerto Rico Aqueduct*. Even today, Mr. Hicks cannot identify what clearly established federal right was violated by the officials. See *Baker v. McCollan*, 443 U.S. 137, 140 (1979). All that he has presented are a series of conclusory allegations. Hicks Br. at 3.

F. Even If State Immunity Itself Does Not Defeat Tribal Jurisdiction, No Such Jurisdiction Exists In This Case Under *Montana v. United States*.

As the opening brief also demonstrates (Pet'r Br. 36-44), *Montana v. United States*, 450 U.S. 544 (1981) creates a presumption against tribal jurisdiction over nonmembers, a presumption that should apply with special force to tribal claims against state officials. Respondents, however, attempt to counter *Montana*'s application here by claiming that tribal courts are "courts of general jurisdiction." Hicks Br. at 18. And they attempt to justify this conclusion by invoking the Court's and Congress' isolated statements about retained tribal sovereignty, but do so in complete disregard of the limitations that have been placed on that sovereignty. *See generally* Pet'r Br. 16-20.

Montana's two exceptions—based on consent and protection of tribal self-governance—plainly do not apply here. In executing their search warrants, the Nevada wardens were hardly "enter[ing] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. And by executing the warrants with approval of a tribal judge, and in the company of tribal officers, the state officials did not engage in conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 566. Rather, their actions in deference to tribal authority simply respected the integrity of the tribal government.

1. Respondents overstate the relevance of several precedents.

Tribal adjudicatory jurisdiction over nonmembers is still an ill-defined proposition, even in the absence of state immunity arguments. Respondents seek in this case a form of tribal authority that the Court has never recognized before. Tribal

civil adjudicatory jurisdiction over nonmember defendants. Because this case involves state officials as nonmember defendants, however, it presents an ill-suited vehicle for making this argument.

Respondents and supporting *amici* take a broad view of this Court's decisions addressing jurisdiction over nonmembers. In truth, although the Court has suggested that nonmember defendants may be subject to a tribe's adjudicatory authority in the proper circumstances, it has never so held. Whenever the question has arisen regarding a specific defendant, tribal jurisdiction has either been found absent, or the question was not decided. *See, e.g., El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999) (no jurisdiction over nonmember defendant); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (no jurisdiction over nonmember defendant); *Duro v. Reina*, 495 U.S. 676 (1990) (no criminal jurisdiction over nonmember Indian); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (no decision on question of jurisdiction over nonmember defendant); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) (no decision on question of jurisdiction over nonmember defendant); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (no criminal jurisdiction over non-Indian). Even in *Williams v. Lee*, 358 U.S. 217 (1959), the issue was the existence of state, not tribal, court jurisdiction.

Nor do other decisions promoting broad tribal authority apply. A number of them involved a Tribe's jurisdiction to tax in situations in which private, consensual *commercial* relationships had been formed. *See, e.g., Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980). The suggestion that the game wardens in this case were engaged in a commercial relationship with Mr. Hicks or his Tribe, not surprisingly, has never been advanced.

2. In respectfully seeking approval of the search warrant from the tribal court, the officers did not consent to jurisdiction.

The Fallon Tribe maintains that the "Wardens recognized and consented to the authority, processes, and procedures of the Tribe as a sovereign," Fallon Tribe Br. at 24, thus justifying assertion of jurisdiction over them in Mr. Hicks' civil actions. Yet, if ever there were a case in which "no good deed goes unpunished," this would be it. The state officials of course did not believe that they were consenting to suit by their actions, and indeed no existing legal precedent would have justified that conclusion. They were simply demonstrating courtesy for the tribal processes, as the Tribe itself ultimately acknowledges: "Both sovereigns [state and tribal] showed exemplary respect and cooperation, each one for the other." Fallon Tribe Br. at 10-11.

This argument also incorrectly assumes that state officials are powerless to pursue state law-enforcement objectives on a reservation—except with the Tribe's consent. A reservation is part of the State in which it lies. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1945); *Draper v. United States*, 164 U.S. 240 (1896). The State also has jurisdiction over off-reservation crimes allegedly committed within the State by tribal members like Mr. Hicks. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). When evidence of crime exists on a reservation within the boundaries of a State, the State is free to pursue the lead. A contrary rule would eliminate state law-enforcement jurisdiction on a reservation, even for the most egregious of state-law crimes, a diminution of state authority that has never been embraced by this Court.

3. Inability to sue state officials does not affect tribal sovereignty.

Respondents and their *amici* predict, but nowhere prove, dire effects if the Court fails to find the jurisdiction that the Tribe asserts. The Fallon Tribe charges that the officials' "allegedly actionable behavior on the reservation threatens and affects the Tribe." Fallon Tribe Br. at 25. It further claims that the State's argument against jurisdiction "impl[ies] second rate status and bias and incompetence of tribal institutions." Brief of Fallon Tribe at 11. Also: "Both the political integrity and health and welfare of the Tribe are directly affected in this case since an injury to a resident tribal member directly implicates the Tribe's important governmental interest in providing a forum to allow tribal members to seek redress." Brief *Amici Curiae* of Pyramid Lake Paiute Tribe, et al., at 23. And "[t]he power to adjudicate civil disputes arising on a sovereign's territory, whether involving citizens or non-citizens, is essential to the success of the Self-determination policy and a necessary attribute of sovereignty for Indian tribes as well as other governments." Brief *Amici Curiae* of the Confederated Tribes of the Colville Reservation, et al., at 21.

None of these Respondents and their *amici*, however, meaningfully explains why it is necessary for Tribes to have jurisdiction over state officials. The treatment accorded federal officials in state courts illustrates that no harm results from the inability of one sovereign's courts to call to account the officials of another sovereign. The Federal Officer Protection Removal Statute, 28 U.S.C. § 1442(a), for example, removes claims against federal officials filed in state courts, including civil rights claims. *Richards v. Harper*, 864 F.2d 85 (9th Cir. 1988). Yet no one contends that state sovereignty is impaired because state courts are deprived of hearing civil cases against federal officials. No more would tribal sovereignty be impaired if claims against state officials were not subject to tribal adjudicatory jurisdiction.

The State no more than the Federal Government maintains that its officials are absolutely immune. And like the Federal Government, U.S. Br. at 29 n.22, States are entitled to enforce their immunity rules when their public officials are sued in tribal court. In both settings, of course, errant officers whose actions harm any citizen may be called to account. Yet the remedy lies in federal courts or state courts, not tribal courts.[6]

CONCLUSION

Petitioners agree that Indian Tribes hold a unique place in the Nation, and as such are entitled to the utmost respect and fair treatment. But that does not mean that the Constitution authorizes Tribes to alter, preempt or abrogate State immunity rules regarding the conduct of their public officials. Respondents have not presented any authority or argument that compels a different conclusion. The State respectfully submits that the Ninth Circuit's judgment should be reversed.

---

[6] Relying on Nev. Rev. Stat. § 41.430, Mr. Hicks claims that the State relinquished all civil jurisdiction on reservations. *See* Hicks Br. at 9, 26 n.13, and 45 n.33. The conclusion is mistaken. Section one of the statute is merely Nevada's assumption of *additional* jurisdiction permitted by Pub. Law 280 (67 Stat. 588), and section four is the relinquishment of such additional jurisdiction when Public Law 280 jurisdiction is retroceded. NEV. REV. STAT. §§ 41.430 (1) and (4). The result following retrocession is that state jurisdiction exists in Indian Country to the same extent it exists in any non-Public Law 280 state. *See* 25 U.S.C. § 1323(a); *see generally American Indian Law Deskbook* at 162 (2d ed. 1998). And *Snooks v. Ninth Judicial District Court,* 919 P.2d 1064 (Nev. 1996), also cited by Hicks for the proposition that Nevada courts have conceded away all civil jurisdiction in Indian Country, Hicks Br. at 26 n.13, is merely the adoption of the rule of *Williams v. Lee,* 358 U.S. 217 (1959), disavowing state jurisdiction in actions filed by non-members against tribal members.

Respectfully submitted,

Of Counsel
JEFFREY S. SUTTON
JONES, DAY, REAVIS
& POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio
(614) 469-3855

FRANKIE SUE DEL PAPA
Attorney General of the State
of Nevada
C. WAYNE HOWLE
(*Counsel of Record*)
Senior Deputy Attorney
General
PAUL G. TAGGART
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1227

Counsel for Petitioners

February 2001

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD WALCH
LOS ANGELES COUNTY BAR ASSOCIATION
261 S. Figueroa St., Suite 300
Los Angeles, CA 90012
(213) 627-2727

MARK E. HADDAD*
CATHERINE V. BARRAD
PAUL J. WATFORD
SIDLEY & AUSTIN
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for the Amici Curiae

January 5, 2001

* Counsel of Record

JAN 9 2001

FILED
JAN 2001
OFFICE OF THE CLERK

No. 99-1994

In the Supreme Court of the United States

STATE OF NEVADA, ET AL., PETITIONERS

v.

FLOYD HICKS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
DAVID C. SHILTON
WILLIAM B. LAZARUS
LISA E. JONES
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a tribal court may exercise adjudicatory jurisdiction over a suit brought by a tribal member against state officials in their personal capacities, where the suit arises out of the state officials' conduct on trust lands within the Tribe's reservation in the execution of a search warrant authorized by a tribal court.

2. Whether, when state officials sued in their personal capacities in tribal court invoke an immunity defense arising under federal law, the state officials ordinarily must litigate the defense in tribal court before proceeding to federal court.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	6
Argument:	
I. The tribal court has jurisdiction over claims against the petitioner state officers in their personal capacities based on their execution of search warrants on reservation trust land	7
II. State officers sued in tribal court are entitled to federal immunity defenses, which ordinarily should be adjudicated initially in trial court	17
III. Defendants in tribal court, like those sued in state court, should be given the opportunity to have federal claims against them adjudicated in federal court	24
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Arizona v. *Turtle*, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970)	13
Bad Frog Brewery, Inc. v. *New York State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998)	16
Barrett v. *Barrett*, 878 P.2d 1051 (Okla. 1994)	3
Becenti v. *Vigil*, 902 F.2d 777 (10th Cir. 1990)	25
Behrens v. *Pelletier*, 516 U.S. 299 (1996)	23
Benally v. *Marcum*, 553 P.2d 1270 (N.M. 1976)	13
Boisclair v. *Superior Court*, 41 Cal. 3d 1140 (1990)	21
Boyle v. *United Tech. Corp.*, 487 U.S. 500 (1988)	18

Cases—Continued: Page

Brendale v. *Confederated Tribes*, 492 U.S. 408 (1989) 11
Cabazon Band of Mission Indians v. *Smith*, 34 F. Supp. 2d 1201 (C.D. Cal. 1998), appeal pending, No. 99-55229 (9th Cir.) 20
County of Oneida v. *Oneida Indian Nation*, 470 U.S. 226 (1985) 18
Crawford-El v. *Britton*, 523 U.S. 574 (1998) 16
Custody of Sengstock, In re, 477 N.W.2d 310 (Wis. Ct. App. 1991) 3
Davis v. *Littell*, 398 F.2d 83 (9th Cir. 1968), cert. denied, 393 U.S. 1018 (1969) 21, 22
Davis v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989) 22
Davis v. *Muellar*, 643 F.2d 521 (8th Cir.), cert. denied, 454 U.S. 892 (1981) 14-15
Duro v. *Reina*, 495 U.S. 676 (1990) 19
El Paso Natural Gas Co. v. *Neztsosie*, 526 U.S. 473 (1999) 7, 9, 16, 22, 26, 27, 28, 30
Ford Motor Co. v. *Department of Treasury*, 323 U.S. 459 (1945) 16
Fredericks v. *Eide-Kirschmann Ford, Inc.*, 462 N.W.2d 164 (N.D. 1990) 3
Gesinger v. *Gesinger*, 531 N.W.2d 17 (S.D. 1995) 3
Gutierrez de Martinez v. *Lamagno*, 515 U.S. 417 (1995) 21
Hafer v. *Melo*, 502 U.S. 21 (1991) 15, 16
Hegner v. *Dietze*, 524 N.W.2d 731 (Minn. Ct. App. 1994) 21
Howlett v. *Rose*, 496 U.S. 356 (1990) 17
Iowa Mut. Ins. Co. v. *LaPlante*, 480 U.S. 9 (1987) 3, 8, 9, 15, 25, 27
Johnson v. *Fankell*, 520 U.S. 911 (1997) 23
Jones v. *Meehan*, 175 U.S. 1 (1899) 3

Cases—Continued: Page

Kennerly v. *District Court*, 400 U.S. 423 (1971) 8
Kiowa Tribe v. *Manufacturing Tech., Inc.*, 523 U.S. 751 (1998) 17
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 15, 16
Marriage of Red Fox, In re, 542 P.2d 918 (Or. Ct. App. 1975) 3
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 10, 11, 12, 14
Mesa v. *California*, 489 U.S. 121 (1989) 29
Miccosukee Tribe v. *United States*, No. 00-3453-CIV (S.D. Fla. Dec. 15, 2000) 13
Montana v. *United States*, 450 U.S. 544 (1981) 5, 6, 9, 10, 11, 12, 13, 14
National Farmers Union Ins. Cos. v. *Crow Tribe*, 471 U.S. 845 (1985) 1, 5, 7, 8-9, 10, 22, 25
Neagle, In re, 135 U.S. 1 (1890) 20, 21
New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) 7, 8, 9, 10, 12
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 2, 3, 8, 28
South Dakota v. *Bourland*, 508 U.S. 679 (1993) 11
State v. *Mathews*, 986 P.2d 323 (Idaho 1999), cert. denied, 120 S. Ct. 1190 (2000) 13
Stock W. Corp. v. *Taylor*, 964 F.2d 912 (9th Cir. 1992) 25
Strate v. *A-1 Contractors*, 520 U.S. 438 (1997) 6, 8, 9, 10, 12, 19
Tennessee v. *Davis*, 100 U.S. 257 (1880) 27
Turner v. *Martire*, 82 Cal. App. 4th 1042 (2000) 21
United States v. *McBratney*, 104 U.S. 621 (1881) 12, 18
United States v. *Wheeler*, 435 U.S. 313 (1978) 7

Cases—Continued: Page

United States v. *Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987) 16-17
United Steelworkers v. *Bouligny*, 382 U.S. 145 (1965) 27
Westfall v. *Erwin*, 484 U.S. 292 (1988) 18, 20, 21
White Mountain Apache Indian Tribe v. *Shelley*, 480 P.2d 654 (Ariz. 1971) 21
Williams v. *Lee*, 358 U.S. 217 (1959) 8, 14
Wilson v. *Layne*, 526 U.S. 603 (1999) 17
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 7

Constitution and statutes:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) 20
Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588:
18 U.S.C. 1162 19
25 U.S.C. 1321 *et seq.* 19
28 U.S.C. 1360 19
American Indian Agricultural Resource Management Act, 25 U.S.C. 3713(c) 3
Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 21
Federal Tort Claims Act:
28 U.S.C. 2679(b) 29
28 U.S.C. 2679(d) 21
28 U.S.C. 2679(d)(2) 29
Indian Child Welfare Act of 1978, 25 U.S.C. 1901 *et seq.*:
25 U.S.C. 1911(a) 3
25 U.S.C. 1911(d) 3
Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* 2
25 U.S.C. 1302(2) 14
Indian Reorganization Act, 25 U.S.C. 476 *et seq.* 2

Statutes—Continued: Page

Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*:
25 U.S.C. 450 2
25 U.S.C. 450(a) 2
Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (25 U.S.C. 3601 *et seq.*) 2, 8
25 U.S.C. 3601(4)-(6) 2
25 U.S.C. 3601(5) 1
Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 3
§ 2 3
§ 101 3
§ 106 3
§ 201 3
§ 202 3
National Indian Forest Resources Management Act, 25 U.S.C. 3106(c) 3
5 U.S.C. 702 17
12 U.S.C. 1715z-13(g)(5) 3
18 U.S.C. 1152 18
18 U.S.C. 1153 18
18 U.S.C. 2265 3
25 U.S.C. 2804 19
25 U.S.C. 2804(f) 19
28 U.S.C. 1367(c) 27
28 U.S.C. 1441 ..... 7, 25, 26, 28
28 U.S.C. 1441(a) 29
28 U.S.C. 1441(b) 27
28 U.S.C. 1441(c) 27
28 U.S.C. 1442 (1994 & Supp. IV 1998) 29
28 U.S.C. 1446(b) 27
42 U.S.C. 1983 ..... 7, 15, 16, 17, 25, 27
42 U.S.C. 2210(n)(2) 26

Miscellaneous—*Continued:* *Page*

Department of Justice Policy and Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424 (1996) 2
Fallon Paiute-Shoshone Tribe Law & Order Code (1986):
§ 1-10-040(a) 22
§ 1-30-040 22
40 Fed. Reg. 27,501 (1975) 19
53 Fed. Reg. 5837 (1988) 19
H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. (1993) 3
5 F.V. Harper et al., *The Law of Torts* (2d ed. 1986) 15
Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1 (1997) 2
S. Rep. No. 88, 103d Cong., 1st Sess. (1993) 3
R. Strickland et al., *Felix S. Cohen's Handbook of Federal Indian Law* (1982) 2
Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs, 104th Cong., 1st Sess. (1995) 2
U.S. Comm'n on Civil Rights, *The Indian Civil Rights Act* (1991) 2

In the Supreme Court of the United States

No. 99-1994

STATE OF NEVADA, ET AL., PETITIONERS

v.

FLOYD HICKS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

The United States has long been "committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 & n.20 (1985). Central to tribal sovereignty is proper respect for tribal courts and other tribal institutions. The United States also has a strong interest in the orderly operation of a system of government in which States and Tribes, as coordinate sovereigns, occupy overlapping spheres of authority on reservations. That interest is advanced by recognizing that state officials are entitled, as a matter of federal law, to assert immunity defenses for conduct on a reservation within the scope of their authority and to obtain a federal forum to adjudicate federal claims initially brought against them in tribal court.

STATEMENT

1. "[T]ribal justice systems are an essential part of tribal governments," 25 U.S.C. 3601(5), and many Tribes have formal court systems to adjudicate disputes arising on their

reservations. See U.S. Comm'n on Civil Rights, *The Indian Civil Rights Act* 29-31 (1991); R. Strickland et al., *Felix S. Cohen's Handbook of Federal Indian Law* 332-335 (1982). The United States has provided comprehensive assistance to ensure the availability and quality of tribal courts.[1] Over the past two decades, the number of tribal courts, as well as the number of cases on their dockets, has increased sharply, and there have been significant advances in the professional qualifications of tribal judges and lawyers.[2]

Congress recognized in the Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq.*, that Tribes possess "inherent authority to establish their own form of government, including tribal justice systems," which are "important forums for ensuring public health and safety and the political integrity of tribal governments" and are "the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. 3601(4)-(6). The Senate Report accompanying that Act explained that "tribal courts are per-

---

[1] See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 & n.21 (1978); see, *e.g.*, 25 U.S.C. 450, 450a (Indian Self-Determination and Education Assistance Act, providing funding and assistance for tribal government institutions, including courts); 25 U.S.C. 476 *et seq.* (Indian Reorganization Act, providing for reorganization of tribal governments); 25 U.S.C. 1301 *et seq.* (Indian Civil Rights Act of 1968, recognizing powers of tribal self-government, establishing bill of rights, and providing for development of model code of Indian offenses for tribal courts); 25 U.S.C. 3601 *et seq.* (Indian Tribal Justice Act, establishing Office of Tribal Justice Support within Bureau of Indian Affairs and authorizing appropriations to assist tribal courts). The Department of Justice has played an important role in fostering the development of tribal courts. See Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424 (1996).

[2] See Hon. William Canby, Chair of Ninth Circuit Task Force on Tribal Courts, *Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong., 1st Sess. 58 (1995) ("Tribal Courts today are infinitely more competent and better staffed than they were thirty or even fifteen years ago."); Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 2 (1997) ("The tribal courts, while relatively young, are developing in leaps and bounds.").

manent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). And the Conference Report stated that "civil jurisdiction on an Indian reservation 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.'" H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (quoting *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987)). See also Indian Tribal Justice Technical and Legal Assistance Act of 2000, §§ 2, 101, 106, 201, 202, Pub. L. No. 106-559, 114 Stat. 2778 (making similar findings and authorizing appropriations for tribal justice systems).

Congress has recognized tribal courts' jurisdiction to adjudicate important questions of federal law. For example, Congress has affirmed the exclusive jurisdiction of tribal courts to resolve many disputes under the Indian Child Welfare Act of 1978, see 25 U.S.C. 1911(a), and to enforce the Indian Civil Rights Act of 1968, see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). See also 12 U.S.C. 1715z-13(g)(5) (authorizing federal government to bring mortgage foreclosure actions against reservation homeowners in tribal or federal court). And, although no federal statute generally requires full faith and credit for tribal court judgments,[3] state courts routinely enforce such judgments.[4]

2. a. This case concerns a challenge to the jurisdiction of the Fallon Paiute-Shoshone Tribal Court over two suits brought by respondent Hicks, a tribal member, against

---

[3] Congress has, however, imposed full-faith-and-credit requirements for specific categories of adjudications. See, *e.g.*, 18 U.S.C. 2265 (domestic violence orders); 25 U.S.C. 1911(d) (child custody orders); 25 U.S.C. 3106(c) (National Indian Forest Resources Management Act); 25 U.S.C. 3713(c) (American Indian Agricultural Resource Management Act).

[4] See *Fredericks* v. *Eide-Kirschmann Ford, Inc.*, 462 N.W.2d 164 (N.D. 1990); *Barrett* v. *Barrett*, 878 P.2d 1051 (Okla. 1994); *Gesinger* v. *Gesinger*, 531 N.W.2d 17 (S.D. 1995); *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991); *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975); cf. *Jones* v. *Meehan*, 175 U.S. 1, 31-32 (1899).

officials of the State of Nevada. The suits arise out of state game wardens' execution of two warrants issued by a state court to search Hicks's premises for evidence of a state misdemeanor offense, the killing of a big horn sheep. The wardens sought and received the tribal court's permission to execute the warrants. During each search, the wardens seized a mounted sheep head trophy; the wardens later returned the trophies, concluding that they were not evidence of an offense. Pet. App. A3-A4, B2-B3, E1-G1.

Hicks sued in tribal court to recover money damages allegedly sustained as a result of the execution of the warrants. He named as defendants the State of Nevada and various state and tribal officials in their official and personal capacities. He alleged federal civil rights violations, common law torts, and civil rights violations under tribal law. Pet. App. A4; *id.* at I1-I5 (amended complaint).

The state defendants (petitioners here) specially appeared in tribal court and moved to quash service of process, arguing that service was deficient and that the tribal court lacked personal jurisdiction over them. Pet. App. J1-J7. The tribal court granted the motion. *Id.* at L2. The Inter-Tribal Court of Appeals reversed. It held that service of process was valid and that personal jurisdiction existed over petitioners based upon their voluntary entry onto the Reservation and voluntary submission to the tribal court's jurisdiction in seeking the warrants. *Id.* at C1-C8.

b. Petitioners then filed this action in federal district court. They sought an injunction against the tribal court proceedings and a declaratory judgment that "the Fallon Tribal Court may not exercise jurisdiction over the State of Nevada and its officers and employees." The complaint named as defendants Hicks, the tribal court judge, and the tribal court itself (respondents here). Pet. App. B3-B4.

Hicks moved in tribal court to dismiss all claims against the State and its officers in their official capacities. The tribal court, which had stayed its proceedings during the

pendency of the federal court proceedings, lifted the stay to grant the motion. As a consequence, the district court held that questions regarding the tribal court's jurisdiction over the State and its officers in their official capacities were moot. Pet. App. B4, B18 n.3.

The district court subsequently granted summary judgment for respondents. Pet. App. B1-B24. The court held that petitioners had exhausted their tribal court remedies with respect to the jurisdictional question, as required by *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985). Pet. App. B7-B8. The court then held that the tribal court's exercise of jurisdiction over Hicks's suits comported with *Montana* v. *United States*, 450 U.S. 544 (1981), because providing a forum for the adjudication of tribal members' tort claims against nonmembers involving events on tribal or trust land on a reservation is important to a Tribe's political integrity. Pet. App. B13. The court further concluded that the tribal court was not deprived of jurisdiction because petitioners are state officials. The court explained that the potential availability of an immunity defense is not a jurisdictional bar to suit and that petitioners had not exhausted their tribal court remedies with respect to the merits of such a defense. *Id.* at B15-B17.

c. A divided panel of the Ninth Circuit affirmed. Pet. App. A1-A23. The panel held that "[t]he Tribe's unfettered power to exclude state officers from its lands implies its authority to regulate the behavior of non-members on that land." *Id.* at A11. The panel reasoned that tribal sovereignty over trust lands on the Reservation was not diminished by the tribal court's approval of the search warrants, which the panel characterized as allowing state officers to come onto those lands only "for a limited, clearly delineated purpose." *Ibid.* Accordingly, the panel held that, because the Tribe had authority to regulate the conduct of the officers on trust lands, the tribal court has civil adjudicatory jurisdiction over the officers' conduct. *Id.* at A12. The panel

declined to consider the merits of petitioners' immunity defenses because petitioners had not yet presented those defenses to the tribal court. *Id.* at A14-A15.

Judge Rymer dissented. In her view, because the tribal court had authorized the searches of Hicks's residence, the Tribe had ceded its right to exclude petitioners from the Reservation and therefore could not, under *Montana*, exercise jurisdiction over them. Pet. App. A16-A19.

SUMMARY OF ARGUMENT

A. The tribal court has jurisdiction over the claims against petitioners in their personal capacities for federal constitutional violations and tribal-law torts. Those claims arise out of petitioners' execution of search warrants within the Reservation on land held in trust for a tribal member. This Court has recognized that "tribes retain considerable control"—both regulatory and adjudicatory—"over nonmember conduct on tribal land" within a reservation. *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997).

The Court has also recognized that Tribes possess authority over the conduct of nonmembers elsewhere within a reservation where that conduct involves "consensual relationships with the tribe or its members" or affects "the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 520 U.S. at 446 (quoting *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981)). Here, petitioners entered into a consensual relationship with the Tribe because, in order to execute the warrants, they were required to, and did, obtain authorization from the tribal court. Moreover, a Tribe's political integrity and welfare are threatened when state officials, invoking the Tribe's own authority, are alleged to have violated the rights of its members on its reservation.

B. The tribal court should be afforded the initial opportunity to consider petitioners' federal immunity defenses—which include not only qualified immunity under 42 U.S.C.

1983, but also an immunity from tribal-law claims for acts within the scope of their official duties. As the Court recognized in *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985), exhaustion of tribal court procedures promotes tribal self-government, enables the tribal court to consider the limitations on its own authority, and avoids simultaneous litigation in tribal and federal court. We have no reason to believe that petitioners' federal immunity defenses could not be adjudicated in tribal court—and then, if necessary, in federal court—before petitioners would be subject to full discovery and trial in tribal court.

C. Although the tribal court has jurisdiction over the claims against petitioners, they, like defendants in state court, should have an opportunity to obtain a federal forum for the adjudication of claims arising under federal law. Under 28 U.S.C. 1441, a state court defendant has a right to remove federal claims (and pendent state claims) to federal court. Here, a comparable result may be obtained by a federal court injunction against tribal court adjudication of the federal claims. See *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 485 (1999).

ARGUMENT

I. THE TRIBAL COURT HAS JURISDICTION OVER CLAIMS AGAINST THE PETITIONER STATE OFFICERS IN THEIR PERSONAL CAPACITIES BASED ON THEIR EXECUTION OF SEARCH WARRANTS ON RESERVATION TRUST LAND

A. Indian Tribes are unique political entities that possess inherent sovereignty "over both their members and their territory." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); see also *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 547-549 (1832). "[T]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal

sovereignty." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 451 (1997) (quoting *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987)). For that reason, this Court has recognized that tribal courts are an "appropriate forum[]"—sometimes the exclusive forum—for the adjudication of "disputes affecting important personal and property interests of both Indians *and non-Indians*." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (emphasis added). The Court has rejected attacks on the institutional competency of tribal courts as "contrary to * * * congressional policy," *Iowa Mut.*, 480 U.S. at 19, and to its own precedents, *Santa Clara Pueblo*, 436 U.S. at 65-66. See also 25 U.S.C. 3601 *et seq.*

The Court has upheld tribal courts' exercise of civil adjudicatory jurisdiction in various contexts affecting non-Indians. See, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959) (tribal court has exclusive jurisdiction to adjudicate on-reservation contract dispute brought by non-Indian against Indian; "[i]t is immaterial that respondent is not an Indian," because "[h]e was on the Reservation and the transaction with an Indian took place there"); *Santa Clara Pueblo*, 436 U.S. at 65-66 (tribal courts have exclusive jurisdiction to enforce federal guarantees to Indians and non-Indians under Indian Civil Rights Act); *Kennerly* v. *District Court*, 400 U.S. 423 (1971) (per curiam). See generally *New Mexico*, 462 U.S. at 335-336 ("[T]ribes have the power to manage the use of their territory and resources by both members and non-members, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes.").

Moreover, the Court has articulated a prudential rule that federal courts should, in deference to "tribal self-government and self-determination," refrain from considering challenges to a tribal court's exercise of jurisdiction over a case until the challenge has been considered by the tribal court itself. See *Iowa Mut.*, 480 U.S. at 15; *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985). Both of those cases

arose out of suits in tribal court against non-Indian defendants—and, in the latter case, "a political subdivision of the State," 471 U.S. at 847—based on their conduct within a reservation. Indeed, the Court recognized in *Iowa Mutual* that such suits "presumptively" are within a tribal court's jurisdiction, "unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18.

The Court recently held that a Tribe does not possess adjudicatory authority over a suit between non-Indians involving events on reservation lands over which the Tribe has relinquished regulatory authority. See *Strate*, 520 U.S. at 455 (involving right-of-way for state highway). At the same time, however, the Court "readily agree[d]" that "tribes retain considerable control over nonmember conduct on tribal land." *Id.* at 454; cf. *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (distinguishing *Strate* as "deal[ing] with claims against nonmembers arising on state highways," whereas "the events in question here occurred on tribal lands"). It thus remains the case that a Tribe retains expansive authority—including civil adjudicatory authority—over nonmember conduct on "land belonging to the Tribe or held by the United States in trust for the Tribe." *New Mexico*, 462 U.S. at 331. Even on non-Indian fee lands within a reservation, a tribal court may exercise jurisdiction over nonmembers to the extent that they have "enter[ed] consensual relationships with the tribe or its members" or engaged in "conduct that threatens or directly affects the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 520 U.S. at 446 (quoting *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981)).

Petitioners assert (Br. 40-41) that this Court's precedents, including *Montana*, do not "establish[] a distinction" with respect to tribal jurisdiction over nonmembers on a reservation based on "land status." To the contrary, the Court has repeatedly recognized that a Tribe may exercise signifi-

cantly greater authority over the conduct of nonmembers on tribal or trust lands within its reservation. See, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) ("the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose"). In *Montana* itself, the Court "agree[d]" with the court of appeals' holding that "the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe," or may enforce lesser restrictions on nonmembers' hunting and fishing there. 450 U.S. at 557. The Court then considered whether the Tribe could *also* regulate nonmembers' hunting and fishing on "reservation land owned in fee by nonmembers of the Tribe." *Ibid.* It was in that context that the Court held that the Tribe could not regulate nonmember hunting and fishing, because those activities did not implicate "consensual relationships" with the Tribe or "threaten the Tribe's political or economic security." *Id.* at 566. *Montana* thus drew the very jurisdictional distinction based on "land status" that petitioners seek to avoid. See *New Mexico*, 462 U.S. at 330-331 (describing distinction drawn in *Montana* based on land status).[5]

In subsequent cases, the Court has continued to focus on the status of the land on which the nonmember's activities occurred. Only where a Tribe relinquished its interests in reservation land has the Court confined the Tribe's jurisdiction over nonmembers to the circumstances enumerated in *Montana*. See, *e.g.*, *Strate*, 520 U.S. at 442, 454-456 (federal grant of right-of-way to the State precluded Tribe's exercise of proprietary rights and rendered highway equivalent of non-Indian fee land); *South Dakota* v. *Bourland*, 508

---

[5] Petitioners also invoke (Br. 40-41) cases involving Tribes' criminal jurisdiction over nonmembers. But this Court has declined to equate Tribes' civil jurisdiction with their criminal jurisdiction. See, *e.g.*, *National Farmers*, 471 U.S. at 854-855 & nn.16, 17.

U.S. 679, 683, 694-695 (1993) (Tribe retained no inherent authority to regulate nonmember hunting and fishing on reservation lands held by United States for a flood-control project, where Tribe conveyed "all tribal * * * interests" in those lands to United States and "Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing"); *Brendale* v. *Confederated Tribes*, 492 U.S. 408, 433-448 (1989) (opinion of Stevens and O'Connor, JJ.) (distinguishing between fee lands in area where Tribe retained power to control access to, and character of, reservation land and fee lands in area where Tribe did not retain such power).

An approach that distinguishes between a Tribe's authority over tribal and trust lands, as opposed to non-Indian lands, within a reservation is consistent with reasonable expectations. As the Court observed in *Montana*, Congress would not have expected a Tribe to continue to exercise extensive jurisdiction over the activities of non-Indians on reservation lands that were alienated to a non-Indian. See 450 U.S. at 560 n.9. Nor would the non-Indian landowner expect the Tribe to exercise such jurisdiction. But the contrary expectation would exist with respect to reservation lands that are owned by a Tribe outright or that are held in trust for the Tribe or its members. A Tribe would reasonably expect that it retained its inherent sovereignty over such lands and that, because it could deny non-Indians access to those lands, it could regulate the activities there of anyone who was granted access. See *Merrion*, 455 U.S. at 136-148. Correspondingly, a non-Indian would reasonably expect that, in entering such reservation lands, he subjects himself to regulation by the Tribe.[6]

---

[6] Contrary to petitioners' contention (Br. 43), an approach that based a Tribe's civil jurisdiction over the activities of nonmembers on a reservation solely on the *Montana* exceptions—and not in the first instance on whether those activities occurred on tribal or trust land—would likely be

B. The court of appeals correctly held that the tribal court possessed jurisdiction over Hicks's claims against petitioners in their personal capacities for federal constitutional violations and tribal-law torts allegedly committed while executing search warrants on the Reservation.

1. It appears to be undisputed that the conduct giving rise to those claims—the search of a tribal member's premises and seizure of his property—took place on reservation land held in trust for an individual Indian. See Pet. App. A3, B2, F1, G1, I2-I3. The tribal court's jurisdiction thus was invoked with respect to "nonmember conduct on tribal land" —conduct over which, as the Court recognized in *Strate*, "tribes retain considerable control." 520 U.S. at 454; see also *New Mexico*, 462 U.S. at 332; *Montana*, 450 U.S. at 557. The Tribe's authority over that land was not "alienated," as petitioners suggest (Br. 44), when they obtained the tribal court's permission to enter the land for the limited purpose of executing the warrants. Indeed, even in circumstances where a Tribe more extensively relinquished its authority to exclude certain non-Indians from tribal lands by entering into a long-term lease with them, the Court held that the Tribe did not thereby relinquish its authority to tax (or, presumably, otherwise to regulate) their activities on the lands. *Merrion*, 455 U.S. at 137-144. Here, moreover, in recognizing that a warrant to search Hicks's premises would be effective only if approved by the tribal court, the state court confirmed the Tribe's jurisdiction over that land. See Pet. App. G1 ("This Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court.").[7] The

---

less, rather than more, "reliable" or "workable" in practice than the current approach.

[7] As a general matter, although state officials have jurisdiction to investigate and prosecute crimes on a reservation that exclusively involve non-Indians, see *United States* v. *McBratney*, 104 U.S. 621 (1881), they do

tribal court exercised that jurisdiction not only by approving the warrants, but also by imposing conditions on their execution. See *ibid.* (limiting first search "to exterior premises only and to vehicles thereon").

2. The tribal court was entitled to exercise jurisdiction here even if one accepts, *arguendo*, petitioners' (erroneous) view that, unless one of *Montana*'s exceptions applies, a tribal court cannot exercise jurisdiction over nonmembers' conduct even on tribal or trust land within a reservation.

Under *Montana*'s first exception, which recognizes that a Tribe's "inherent sovereign power" extends to "the activities of nonmembers who enter consensual relationships with the tribe or its members," 450 U.S. at 565, petitioners entered into a consensual relationship with the Tribe when they sought and received the tribal court's permission to exercise their state authority within the Reservation for a limited purpose. They would have understood, as the state court advised them (see Pet. App. G1), that they could execute the warrants only with the tribal court's permission. They would also have understood that the tribal court could, and

---

not have jurisdiction with respect to crimes involving Indian perpetrators or Indian victims. In addition, on those reservations (unlike this one) where Public Law 280 is applicable, state officials have jurisdiction to investigate and prosecute crimes involving Indians as well. See p. 19 & note 11, *infra*. But, as the state court recognized when it issued the warrants in this case, its jurisdiction did not extend to Indian lands on the Reservation, and, for similar reasons, state officials had no inherent authority to enter onto tribal or trust lands within the Reservation in the circumstances of this case. Cf. *Benally* v. *Marcum*, 553 P.2d 1270 (N.M. 1976) (state officers cannot arrest Indian on reservation for off-reservation crime, but must instead follow tribal procedures); *Arizona* v. *Turtle*, 413 F.2d 683 (9th Cir. 1969) (same for extradition to another State), cert. denied, 396 U.S. 1003 (1970); but cf. *State* v. *Mathews*, 986 P.2d 323 (Idaho 1999) (state officers may execute search warrant in absence of tribal procedures), cert. denied, 120 S. Ct. 1190 (2000). See also *Miccosukee Tribe* v. *United States*, No. 00-3453-CIV (S.D. Fla. Dec. 15, 2000) (enjoining service of subpoena issued by state court to Indians on reservation to appear as witnesses in state criminal case).

indeed did (see *ibid.*), impose conditions on their execution of the warrants. Surely, if petitioners had violated any express condition that the tribal court imposed (*e.g.*, if they had executed the first warrant inside Hicks's residence), the tribal court would not have been powerless to call them to account. Cf. *Merrion*, 455 U.S. at 144 (recognizing that Tribe may "oust" non-Indian granted permission to enter its reservation if he does not comply "with the initial conditions of entry"). Accordingly, much like a non-Indian merchant who chooses to engage in business on a reservation with members of a Tribe, see *Williams*, 358 U.S. at 220, petitioners chose to enter into a consensual relationship with the Tribe and its members.[8]

Under *Montana*'s second exception, which recognizes a Tribe's authority over nonmember "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," 450 U.S. at 566, a tribal court may exercise jurisdiction over nonmembers who are alleged to have invoked the Tribe's own authority to violate the legal rights of its members on its reservation. At least in the circumstances here, where state officers executed a warrant approved by a tribal court and were accompanied by a tribal officer in doing so, the Tribe's "political integrity" and "welfare" are significantly implicated. Indeed, the Indian Civil Rights Act obligates the Tribe, in "exercising powers of self-government," to respect "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures." 25 U.S.C. 1302(2). Cf. *Davis* v. *Muellar*, 643 F.2d

---

[8] Contrary to petitioners' assertions (Br. 37), the state game wardens' conduct here does not "parallel[]" the non-Indian truck driver's conduct in *Strate*. It is disingenuous for petitioners to contend (*ibid.*) that "Hicks was not a party to the relationship between the state officials and the Tribe." Hicks and his property were the subject of the state officials' dealings with the Tribe; indeed, Hicks was an intended beneficiary of the tribal court's limiting of the first search to the exterior of his residence.

521, 525 n.8 (8th Cir.) ("refusal of state police officers to recognize legitimate tribal judicial authority while on the reservation is at least to some extent state interference with tribal sovereignty"), cert. denied, 454 U.S. 892 (1981).

C. Petitioners argue (Br. 7), however, that Tribes have been divested of *any* "judicial power over state officials," regardless of the capacity in which they are sued. Petitioners cannot point to any Treaty or Act of Congress divesting Tribes generally, or the Fallon Paiute-Shoshone Tribe specifically, of all power to adjudicate claims against state officers in their personal capacities. Cf. *Iowa Mut.*, 480 U.S. at 18. But petitioners assert (Br. 9-29), based on principles of sovereign and qualified immunity, that state officials may never be sued in tribal court. Petitioners are mistaken.

It is indisputable that the underlying suits in tribal court are against state officers sued solely in their personal capacities. Pet. App. A5, A13, A23 n.13; see pp. 4-5, *supra*. See *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991) (explaining distinction between personal- and official-capacity suits). The sovereign immunity of a State does not pose any jurisdictional bar to a suit against a state officer in his personal capacity. That is not a rule of recent invention, or one limited to Section 1983 actions. As a leading torts treatise has observed, "[t]he Anglo-American tradition did not include a general theory of immunity from suit or from liability on the part of public officers." 5 F.V. Harper et al., *The Law of Torts* § 29.8, at 653-654 (2d ed. 1986). That principle has been repeatedly recognized by this Court in cases involving common-law tort and contract claims as well as claims for federal constitutional violations. In *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), for example, the Court explained that, if the "wrongful actions" of "[g]overnment officers" are "such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit

against him." *Id.* at 686. Thus, "[i]n a suit against the officer to recover damages for the agent's personal actions" in the performance of his duties, the "question is easily answered" that the suit is not against the government and thus is not barred by sovereign immunity. *Id.* at 687; accord, *e.g.*, *Hafer*, 502 U.S. at 30 (sovereign immunity does not bar Section 1983 suits against state officials in their personal capacities); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 462 (1945) ("Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."); *Bad Frog Brewery, Inc.* v. *New York State Liquor Auth.*, 134 F.3d 87, 102 (2d Cir. 1998) (sovereign immunity does not bar federal courts from entertaining suits against state officers in their personal capacities for violations of state law).

Although immunity defenses are available in tribal court to state officers sued in their personal capacities (see Part II, *infra*), the availability of such defenses does not divest the tribal court of jurisdiction. See *Larson*, 337 U.S. at 687 n.7 (contrasting "limitations on the court's jurisdiction to hear a suit directed against the sovereign" with immunity defenses of the sovereign's officers); *Crawford-El* v. *Britton*, 523 U.S. 574, 587 (1998) (explaining that qualified immunity is an affirmative defense and the burden of pleading it rests with the defendant). A tribal court thus has jurisdiction to decide, in the first instance, whether any immunity defenses protect petitioners from suit in this case. See *El Paso*, 526 U.S. at 485 n.7 (recognizing general competence of tribal courts to adjudicate federal defenses).[9]

---

[9] There is no occasion in this case for the Court to decide whether sovereign immunity would bar all unconsented suits in tribal court against a State or against state officials in their official capacities. Cf. *United States* v. *Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986) (enjoining tribal court injunctive action against federal officers in their official

II. STATE OFFICERS SUED IN TRIBAL COURT ARE ENTITLED TO FEDERAL IMMUNITY DEFENSES, WHICH ORDINARILY SHOULD BE ADJUDICATED INITIALLY IN TRIBAL COURT

In our view, although Nevada's sovereign immunity does not extend to state officials sued in tribal court in their personal capacities, federal law does afford state officers immunity from such suits for conduct within the scope of their official duties. Thus, as we explain below, state officers sued in tribal court, whether under federal or tribal law, may assert federal immunity defenses, although the basis and scope of the defense may differ in the two settings. We agree with the courts below that the prudential tribal court exhaustion rule of *National Farmers* and *Iowa Mutual* ordinarily should apply to those federal immunity defenses as they do to federal jurisdictional defenses.

1. State officials who are sued under 42 U.S.C. 1983 for violations of federal statutory or constitutional rights are entitled to "qualified immunity"—*i.e.*, they are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). The same qualified immunity defense applies, as a matter of federal law, whether the Section 1983 action is brought in federal or state court. See *Howlett* v. *Rose*, 496 U.S. 356, 375 (1990) ("The elements of, and the defenses to, a federal cause of action are defined by federal law."). The defense therefore necessarily applies in

---

capacities), cert. denied, 481 U.S. 1069 (1987); 5 U.S.C. 702 (waiving sovereign immunity to such suits only in federal court). We assume for present purposes, however, that a tribal court could not entertain an unconsented suit against the State itself, or a suit for damages against state officers in their official capacities. Cf. *Kiowa Tribe* v. *Manufacturing Tech., Inc.*, 523 U.S. 751 (1998) (sovereign immunity bars unconsented suit for damages against Tribe in state court).

tribal court as well. We do not understand respondents to contend otherwise. See Br. in Opp. 24-25.

2. As to tort claims arising under tribal law that are asserted against state officers, an immunity defense also should be available, as a matter of federal law, to the extent that those officers acted within the scope of any state duties that federal law authorized them to perform on a reservation.[10] An analogous defense should be available to tribal officials sued in state court on state common-law tort claims to the extent that they acted within the scope of their federally protected tribal authority.

Such an immunity defense, based on our constitutional structure relating to Indian affairs, would serve an important federal interest: the orderly operation of a system of government in which the States and the Tribes, as coordinate sovereigns, occupy overlapping spheres of authority. Inevitably, the agents of one sovereign, in the conduct of their official duties, come within the adjudicatory jurisdiction of the other sovereign. It is sometimes essential that they do so. And they ordinarily should be able to act with the assurance that, if they do not exceed the scope of the authority granted them by their own sovereign (and any authority confirmed to them by the other sovereign), they are immune from suit in the other sovereign's courts.

The overlapping spheres of authority of the States and the Tribes are particularly evident with regard to criminal law enforcement on a reservation. Ordinarily, while the United States and the Tribe have jurisdiction over crimes involving Indian perpetrators or victims, the State has jurisdiction over crimes involving non-Indians. See, *e.g.*, 18 U.S.C. 1152, 1153; *United States* v. *McBratney*, 104 U.S. 621 (1881); see

---

[10] The Court has recognized federal common-law defenses to state causes of action in a variety of contexts in which important federal interests are implicated. See, *e.g.*, *Boyle* v. *United Tech. Corp.*, 487 U.S. 500 (1988); *Westfall* v. *Erwin*, 484 U.S. 292 (1988); see also *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 233-236 (1985).

also *Duro* v. *Reina*, 495 U.S. 676, 680-681 n.1 (1990) (describing the "complex patchwork of federal, state, and tribal law" allocating criminal jurisdiction in Indian country). On reservations covered by Public Law 280,[11] however, the State exercises jurisdiction over crimes involving Indians as well as non-Indians (while the Tribe retains concurrent jurisdiction over crimes committed by Indians). And, pursuant to agreements between the United States and a State, see 25 U.S.C. 2804, state officers may be authorized to enforce federal or tribal law on a reservation. Similar agreements may give tribal officers authority to enforce state law on a reservation. See also *Strate*, 520 U.S. at 456 n.11.

The federal statutory scheme thus contemplates—and sometimes effectively requires—that state officers act within a reservation. It is a necessary incident of that scheme that they be entitled, as a matter of federal law, to immunity from suit under tribal law for acts within the scope of their authority. Tribal law cannot make it unlawful for state officers to carry out functions they have been authorized by federal law to perform. Indeed, Congress has specifically provided a degree of protection from liability for state (or tribal) officers performing federal law-enforcement responsibilities on a reservation pursuant to an agreement. See 25 U.S.C. 2804(f) (treating such state or tribal officers as federal employees for purposes of the Federal Tort Claims Act); see p. 21 note 14, *infra* (discussing suits against federal employees). If the rule were otherwise, state officers could be deterred from entering the reservation—and thus from fully carrying out law-enforcement responsibilities assigned

---

[11] Public Law 280, 67 Stat. 588 (codified as amended at 18 U.S.C. 1162, 25 U.S.C. 1321 *et seq.*, and 28 U.S.C. 1360) granted certain States the authority to exercise criminal jurisdiction in Indian country and made 18 U.S.C. 1152 and 1153 inapplicable in those areas. Nevada, which initially assumed Public Law 280 jurisdiction over reservations in the State, has since retroceded all such jurisdiction. See 40 Fed. Reg. 27,501 (1975); 53 Fed. Reg. 5837 (1988).

to them under federal (and state) law for the protection of the reservation community—for fear of being held personally liable in tribal court under tribal law. Similarly, tribal officers could be deterred from going outside the reservation in the course of their official duties—and thus from carrying out law-enforcement responsibilities they are authorized by federal (and tribal) law to perform—for fear of being held personally liable in state court under state law.[12]

A structural immunity defense that is available, as a matter of federal law, to state officers sued under tribal law and tribal officers sued under state law serves essentially the same purposes as the immunity defenses that have long been available, under the Supremacy Clause and federal common law, to federal officers sought to be held criminally or civilly liable under state law. See, *e.g.*, *Westfall* v. *Erwin*, 484 U.S. 292, 296-300 (1988) (federal officers are entitled to absolute immunity from state-law tort suits arising out of discretionary acts within the scope of their official duties); *In re Neagle*, 135 U.S. 1, 75 (1890) (a federal officer "*cannot* be guilty of a crime" under state law for "an act which he was authorized to do by the law of the United States," "if in doing that act he did no more than what was necessary and proper for him to do"). Such immunity defenses serve to "promot[e] effective government" by freeing government officials from the threat of liability or prosecution that could cause them to be "unduly timid in carrying out their official duties." *Westfall*, 484 U.S. at 295-296. They also assure that one government does not enforce its own laws "in such a manner

---

[12] For example, in order to travel from one part of a reservation to another in pursuit of a fleeing suspect, a tribal police officer may need to drive outside the reservation. If a State were to prosecute the officer for exceeding the posted speed limit, or using an emergency light and siren, significant federal interests would be implicated. Cf. *Cabazon Band of Mission Indians* v. *Smith*, 34 F. Supp. 2d 1201 (C.D. Cal. 1998) (similar question), appeal pending, No. 99-55229 (9th Cir.).

as to paralyze the operations of the [other] government" within the sphere of its authority. *Neagle*, 135 U.S. at 62.[13]

It is unnecessary for the Court now to "define the precise boundaries of official immunity" in this context. *Westfall*, 484 U.S. at 299 (declining to do so in similar circumstances). The scope of federal immunity available to state and tribal officers may appropriately be informed by the scope of the immunity available to federal officers in similar circumstances under the Constitution, federal common law, and federal statutes.[14] Here, as we read the bare allegations of the tribal court complaints (see Pet. App. I1-I5), Hicks is seeking to hold petitioners liable in tort simply for executing, in accordance with their terms, facially valid search warrants that were issued by the state court and approved by the tribal court. We submit that, while the matter is not yet ripe for review in this Court, such conduct would fall well within the scope of the applicable immunity, whatever its precise boundaries.

3. Ordinarily, with respect to federal immunity defenses, as with respect to federal jurisdictional defenses, tribal

---

[13] A number of courts have recognized that tribal officers are entitled to such immunity defenses. See, *e.g.*, *Boisclair* v. *Superior Court*, 41 Cal. 3d 1140, 1157-1158 (1990); *White Mountain Apache Indian Tribe* v. *Shelley*, 480 P.2d 654, 657-658 (Ariz. 1971); *Turner* v. *Martire*, 82 Cal. App. 4th 1042 (2000); *Hegner* v. *Dietze*, 524 N.W.2d 731, 735 (Minn. Ct. App. 1994); see also *Davis* v. *Littell*, 398 F.2d 83 (9th Cir. 1968), cert. denied, 393 U.S. 1018 (1969).

[14] After this Court's decision in *Westfall*, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act, which effectively confers immunity on federal employees for all common-law torts committed within the scope of their employment. If the Attorney General certifies that the employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose," the case is removed to federal court if originally filed in state court, the United States is substituted as the defendant, and the case is governed by the Federal Tort Claims Act. 28 U.S.C. 2679(d); see *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 419-420, 430-432 (1995).

courts should be given "the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers*, 471 U.S. at 856; see also *El Paso*, 526 U.S. at 485 n.7 (noting that "the existence of a federal preemption defenses in the more usual sense would [not] affect the logic of tribal exhaustion" because, "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law"). Applying the exhaustion requirement to immunity defenses would serve several of the salutary purposes identified in *National Farmers*, such as promoting "tribal self-government and self determination," enabling the tribal court to consider the limits on its own authority, avoiding the inefficiency associated with the pendency of a single dispute in two judicial forums, and allowing a full record on relevant factual and legal issues to be developed in the tribal court. See 471 U.S. at 856-857. Moreover, because immunity defenses may also be available by reference to tribal law,[15] the tribal court can consider all such defenses together.

As the Court recognized in *National Farmers*, however, tribal court exhaustion is a prudential rule that may be dispensed with in appropriate circumstances, such as where it "would be futile because of the lack of an adequate opportunity" to raise the challenge. 471 U.S. at 856 n.21. A question could arise as to whether full exhaustion of tribal court remedies should be required if a defendant's federal immunity defenses cannot be fully adjudicated in advance of

---

[15] For example, officials of the Fallon Paiute-Shoshone Tribe are entitled to immunity "for any act performed in the course of duty or in the reasonable belief that such actions were within the scope of official duties, unless it is established that such action was taken with malicious intent or in bad faith." Law & Order Code 1-10-040(a). A tribal court might conclude that a comparable immunity should apply to state officials in tribal court, whether based on comity (cf. *Littell*, 398 F.2d at 86), choice of law (see Law & Order Code 1-30-040 (incorporating Nevada civil law)), federal principles of non-discrimination (cf. *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989)), or other grounds.

trial. An immunity defense is "meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery," upon the favorable resolution of threshold legal issues (*e.g.*, whether their alleged conduct violated clearly established rights). *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) (internal quotation marks omitted). Arguably, at least, that purpose would be defeated if, for example, a defendant had to wait until after trial to obtain review, in the tribal court system and then in the federal court system, of the tribal trial court's rejection of a federal immunity defense. In those circumstances, a defendant perhaps should be allowed to take his federal immunity defenses immediately to federal court, so as to preserve in a meaningful way any "entitlement not to stand trial or face the other burdens of litigation." *Id.* at 306; but see *Johnson* v. *Fankell*, 520 U.S. 911, 916-923 (1997) (States need not provide for interlocutory review of qualified immunity rulings under Section 1983).

There is, however, no need to resolve that issue here. The present record offers no basis to conclude that petitioners' federal immunity defenses could not be adjudicated in advance of any trial in this case. As the courts below recognized (see Pet. App. A12-A14, B16), petitioners have not yet asked the tribal court to decide whether they have valid immunity defenses to any of Hicks's claims. Although petitioners invoked the doctrines of "sovereign immunity" and "qualified immunity" in the tribal court, they did so only in support of their contention that the tribal court lacked personal jurisdiction over them. *Id.* at A13. Accordingly, we read the tribal courts' rulings—such as the tribal trial court's statement that "it is not prevented by * * * qualified immunity from lawfully exerting personal jurisdiction over" petitioners, *id.* at A12-A13—as addressing only a jurisdictional challenge. We note that the tribal trial court, in the severed portion of the case against the tribal defendants, did

entertain pretrial motions to dismiss on immunity grounds.[16] Thus, given the absence of any showing that petitioners could not obtain a definitive resolution of their federal immunity defenses in advance of any trial, petitioners should be required to present those defenses to the tribal court in the first instance.

III. DEFENDANTS SUED IN TRIBAL COURT, LIKE THOSE SUED IN STATE COURT, SHOULD BE GIVEN THE OPPORTUNITY TO HAVE FEDERAL CLAIMS AGAINST THEM ADJUDICATED IN FEDERAL COURT

The fact that the tribal court has jurisdiction as an original matter over respondent Hicks's claims against petitioners under federal and tribal law does not necessarily dictate that all of those claims must remain in tribal court. Petitioners do not suggest the possibility of a mechanism, parallel to removal, that would enable a defendant sued in tribal court on a federal cause of action to have the case heard in federal court. But we believe that such a mechanism, if requested, would be appropriate in the circumstances of this case.

As noted above (at 8-9), in *Iowa Mutual* and *National Farmers*, the Court articulated a rule of comity that gives a preference to tribal courts for the adjudication in the first instance of claims that are brought there by Indians, involve

---

[16] Two of petitioners' co-defendants—the tribal judge who approved the warrants and a tribal officer who participated in their execution—filed pretrial motions to dismiss raising immunity defenses. The tribal court ruled before trial that the judge was not entitled to absolute immunity under tribal law, but was potentially entitled to qualified immunity. *Hicks* v. *Harold*, Nos. CV-FT-91-034 and CV-FT-92-031 (Fallon Tribal Ct. May 18, 1992). Although the court reserved ruling on qualified immunity, apparently to assess whether the evidence demonstrated that the defendants acted with the "malicious intent" or "bad faith" that would defeat immunity under tribal law (see p. 22 note 15, *supra*), it ultimately granted a directed verdict on six counts on, *inter alia*, qualified immunity grounds. Decision and Order Denying All Relief As to Plaintiff's Second Amended Complaint at 4-5, *Hicks* v. *Harold*, *supra* (Sept. 2, 1993).

on-reservation conduct, and arise under tribal (or perhaps state) law. Only after tribal court procedures are exhausted may the federal courts review federal issues that arose in the case, such as whether the tribal court properly exercised jurisdiction over a suit against persons who were not members of the Tribe. See *Iowa Mut.*, 480 U.S. at 16-19; *National Farmers*, 471 U.S. at 855-857.[17]

A different rule would be appropriate, however, where a suit brought in tribal court arises directly under federal law, such as a suit under 42 U.S.C. 1983 alleging violations of federal constitutional or statutory rights. Ordinarily, when a defendant is sued in state court on a claim arising under federal law, the defendant is entitled to remove the case to federal court. See 28 U.S.C. 1441. As a consequence, both the plaintiff *and* the defendant have the right to insist upon a federal forum, rather than a state forum, for the adjudication of a federal cause of action.[18]

Section 1441 refers to removal only from "a State court"; it does not provide for removal from a tribal court. See *Becenti* v. *Vigil*, 902 F.2d 777, 779-780 (10th Cir. 1990) (holding that no right exists under the federal officer removal statute to remove a case from tribal court). It is doubtful, however, that Congress intended to deny tribal court

---

[17] The underlying causes of action in tribal court in *Iowa Mutual* and *National Farmers* did not arise under federal law. The only federal question in those cases in federal court was whether the tribal courts had jurisdiction over the non-federal claims. In our view, however, other federal questions arising in cases brought in tribal court should also be subject to review in federal court. See *Stock W. Corp.* v. *Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (en banc) (abstaining to permit tribal court to make choice-of-law determination in the "first instance").

[18] A defendant, like a plaintiff, may perceive various advantages from the choice of a federal forum for the adjudication of federal claims. Such perceived advantages might include rules of procedure providing (*inter alia*) for liberal discovery, the greater availability of summary judgment, the right to a jury trial, geographic proximity, the greater expertise of federal courts in dealing with questions of federal law, and the insulation of life-tenured federal judges from popular pressure.

defendants the right given state court defendants to elect a federal forum for the adjudication of causes of action under federal law. It is more likely that Congress simply did not consider the matter.

The Court faced an analogous situation in *El Paso*. The Price-Anderson Act converts all claims of "public liability" arising out of nuclear incidents into claims under federal law and provides for the removal of all cases raising such claims from state court to federal court. See 42 U.S.C. 2210(n)(2). But Congress was silent on the treatment of similar claims filed in tribal court. The Court concluded that "inadvertence seems the most likely" explanation for "Congress's failure to provide for tribal-court removal." 526 U.S. at 487. Accordingly, the Court held that the federal courts are entitled to decide, without awaiting tribal court exhaustion, whether claims filed in tribal court are encompassed by the Price-Anderson Act and, to the extent they are, to enjoin their prosecution. *Id.* at 487-488. The Court noted that Congress "expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested." *Id.* at 484-485. It then reasoned that an "[i]njunction against further litigation in tribal courts would in practical terms give the same result as a removal"—*i.e.*, "if [the tribal court plaintiffs] then should wish to proceed they would be forced to refile their claims in federal court." *Id.* at 485.

Similarly, here, the general removal statute, 28 U.S.C. 1441, reflects an "unmistakable preference for a federal forum, at the behest of the defending party," *El Paso*, 526 U.S. at 484, for adjudicating claims arising under federal law. Thus, in the absence of any affirmative indication that Congress intended to deny tribal court defendants the same right as state court defendants to have federal claims heard in federal court, tribal court defendants should be afforded

an opportunity to obtain, if necessary, an "[i]njunction against further litigation in tribal courts [that] would in practical terms give the same result as a removal." *Id.* at 485.[19] Since removal typically operates with respect to the entire case—both the federal claims and any pendent state-law claims—such an injunction in this case could operate with respect to the entire case as well. In certain circumstances, however, the federal court should decline to enjoin tribal court litigation of non-federal claims, such as where federal law vests exclusive jurisdiction over those claims in the tribal court or where the governing tribal law cannot readily be ascertained. Cf. 28 U.S.C. 1367(c) (identifying circumstances in which district courts may decline to exercise supplemental jurisdiction); 28 U.S.C. 1441(c) (providing that a district court, "in its discretion, may remand all matters in which State law predominates"). Moreover, since a defendant's right to remove a case from state court is lost if not timely asserted, see 28 U.S.C. 1446(b), the federal court may appropriately deny an injunction against tribal court proceedings if it is not sought early in the case.[20]

---

[19] There is no occasion here to consider whether causes of action under federal laws that distinctly concern Indians (as distinguished from generally applicable causes of action such as that under 42 U.S.C. 1983) should be allowed to remain in tribal court.

[20] In our view, a defendant's opportunity to elect a federal forum in lieu of a tribal forum should not extend to cases in which federal jurisdiction would be based solely upon diversity of state citizenship. Cf. *Iowa Mut.*, 480 U.S. at 17-19. The rationale for jurisdiction in federal rather than *state* court where an in-state party may have an advantage over an out-of-state party in that court does not support removal from *tribal* court simply because the parties (Indian or non-Indian) happen to be from different States. Moreover, this Court has not suggested that the interests served by diversity removal are as significant as the interests served by removal based on a federal cause of action or the defendant's status as a federal officer. See *Tennessee* v. *Davis*, 100 U.S. 257, 266-267 (1880) (addressing importance of the two latter types of removal); see also 28 U.S.C. 1441(b), 1446(b); *United Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145, 148 & n.6 (1965) (limits on removal in diversity cases).

The procedure that we propose would reflect no disrespect of tribal courts. It would, rather, place tribal courts on an equal footing with state courts with respect to the adjudication of causes of action under federal law that are within the scope of their original jurisdiction but also within the concurrent original jurisdiction of the federal courts. See *El Paso*, 526 U.S. at 485 (observing that Price-Anderson Act's provisions for preemption and removal from state courts demonstrate that "[a]ny generalized sense of comity toward nonfederal courts is obviously displaced"). As this Court has recognized, tribal courts, like state courts, are competent to adjudicate questions of federal law. See, *e.g.*, *id.* at 485 n.7; *Santa Clara Pueblo*, 436 U.S. at 65. But tribal courts, like state courts, ordinarily have no special expertise with respect to those questions. Furthermore, given that a tribal court's rulings on federal jurisdictional issues (and potentially other federal issues) are subject to subsequent review in federal court (see p. 25 note 17, *supra*), a threshold injunction against tribal court proceedings may be significantly more efficient and not significantly more intrusive than remitting the defendant to full tribal-court adjudication in the first instance would be. See *El Paso*, 526 U.S. at 486 (noting "inefficiencies" that would be produced by "duplicative determinations" in tribal court and federal court regarding preemption under Price-Anderson Act).[21]

Of course, a tribal court plaintiff remains the master of his complaint. Thus, a tribal court plaintiff, like a state court plaintiff, may amend the complaint to eliminate federal

---

[21] To be sure, as we explained in our brief amicus curiae in *El Paso* (at 25 n.13), the justification for displacing tribal courts upon the defendant's election in cases encompassed by the Price-Anderson Act is stronger than the justification for displacing tribal courts upon the defendant's election in federal question cases generally. Nevertheless, we believe that the clear policy, codified in 28 U.S.C. 1441, of affording the defendant in a case arising under federal law the opportunity to have the case heard in federal court supports the same approach in this setting.

claims, and thereby avoid adjudication of the entire case (including any pendent claims under tribal law) in federal court.[22]

It is uncertain how the parties to this case would respond to the availability of a mechanism, parallel to removal under 28 U.S.C. 1441(a), that would enable the case, as currently pleaded, to be tried in federal court rather than tribal court. If this Court recognizes such a mechanism, and if petitioners elect to invoke it, they should first be required to notify the tribal court of their intention to do so. Such an approach would exhibit an appropriate deference to the tribal court, which could elect to stay its own hand pending the plaintiff's refiling of the case in federal court. It would also afford the plaintiff an opportunity to amend the complaint to eliminate any federal causes of action before the commencement of a federal injunctive action, thereby sparing all parties the

---

[22] If a suit were to be brought in tribal court against federal officials in their personal capacities, several other statutory provisions would be relevant. First, the exclusive remedy for common-law torts committed by federal officers or employees within the scope of their office or employment is a Federal Tort Claims Act suit against the United States in federal district court. 28 U.S.C. 2679(b). Such cases may be removed from state to federal court upon certification by the Attorney General. See 28 U.S.C. 2679(d)(2); p. 21 note 14, *supra* (discussing Westfall Act). A tribal court, like a state court, is thus precluded, as a matter of controlling federal law, from providing any alternative remedy. Second, in addition to the right of all defendants to remove a case from state court to federal court based on the existence of a federal cause of action, a federal officer also has a right to remove a case (even one not arising under federal law) based on his status as such, as long as the officer asserts a colorable immunity or other federal defense. 28 U.S.C. 1442 (1994 & Supp. IV 1998); *Mesa* v. *California*, 489 U.S. 121 (1989). A federal officer therefore should be entitled to obtain an injunction against tribal court proceedings based on the assertion of such a defense. Finally, because of the status of the Tribes as dependent sovereigns within the federal system, additional considerations may apply to the exercise of tribal court jurisdiction over federal officers even when sued in their personal capacities. We thus do not foresee any circumstances in which a plaintiff could plead a cause of action in tribal court against a federal officer for acts within the scope of his office that could not be enjoined by a federal court.

unnecessary costs of filing and responding to an action in federal court.[23] Accordingly, while the mechanism that we propose could ultimately provide petitioners with a substantial measure of the relief that they sought in the district court if they choose to invoke it, we do not believe that approval of that mechanism by the Court here would require an alteration of the judgment below, which simply defers to the tribal court's initial exercise of jurisdiction in the current posture of the case.

CONCLUSION

The judgment of the court of appeals should be affirmed, without prejudice to petitioners' timely invocation of the procedure discussed in Part III of this brief.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
DAVID C. SHILTON
WILLIAM B. LAZARUS
LISA E. JONES
Attorneys

JANUARY 2001

---

[23] No similar justification existed in *El Paso* for allowing the tribal court plaintiffs an opportunity to replead their claims. Claims asserting liability for a "nuclear incident," even if pleaded under state law, are deemed to be federal claims under the Price-Anderson Act. See 562 U.S. at 477, 484.

NOV 30 2000

No. 99-1994

Supreme Court, U.S.
FILED
NOV 30 2000
CLERK

In The

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,

Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF MONTANA, ALABAMA, ARIZONA, CONNECTICUT, FLORIDA, KANSAS, MICHIGAN, MISSISSIPPI, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WISCONSIN AND WYOMING IN SUPPORT OF PETITIONERS

JOSEPH P. MAZUREK
Attorney General
State of Montana
CLAY R. SMITH
Solicitor
Counsel of Record
HARLEY R. HARRIS
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

[Additional Appearances On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

BILL PRYOR
Attorney General
State of Alabama

JANET NAPOLITANO
Attorney General
State of Arizona

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

CARLA J. STOVALL
Attorney General
State of Kansas

JENNIFER M. GRANHOLM
Attorney General
State of Michigan

MIKE MOORE
Attorney General
State of Mississippi

HEIDI HEITKAMP
Attorney General
State of North Dakota

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

SHELDON WHITEHOUSE
Attorney General
State of Rhode Island

CHARLES M. CONDON
Attorney General
State of South Carolina

MARK BARNETT
Attorney General
State of South Dakota

JOHN CORNYN
Attorney General
State of Texas

JAN GRAHAM
Attorney General
State of Utah

JAMES E. DOYLE
Attorney General
State of Wisconsin

GAY WOODHOUSE
Attorney General
State of Wyoming

QUESTION PRESENTED

When state officers are sued in tribal court with respect to the performance of activities within the scope of their governmental employment, must they exhaust tribal remedies before seeking a federal court determination of whether an Indian tribe possesses inherent authority over them, and, if not, does the tribe have such authority?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF AMICI CURIAE STATES 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 8

I. PETITIONERS HAVE NO OBLIGATION TO EXHAUST THEIR DEFENSE OF IMMUNITY FROM SUIT. INHERENT IN IMMUNITY IS THE RIGHT NOT TO BE EXPOSED TO PROCEEDINGS IN TRIBAL COURT FOR ANY PURPOSE, AND THE DEFENSE'S DETERMINATION IMPLICATES NONE OF THE COMITY CONSIDERATIONS IDENTIFIED IN *NATIONAL FARMERS* 8

II. TRIBAL INHERENT AUTHORITY DOES NOT EXTEND TO REGULATING OR ADJUDICATING THE RIGHTS OF STATES OR THEIR OFFICERS WHEN CARRYING OUT SOVEREIGN RESPONSIBILITIES 13

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) .. 1, 24, 25, 27, 28, 29

Allen v. McCurry, 449 U.S. 90 (1980) 16

Behrens v. Pelletier, 516 U.S. 299 (1996) 10

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 18, 25

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 1, 21, 24

Claflin v. Houseman, 93 U.S. 130 (1876) 17

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 22

County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) 3

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 22

Dugan v. Rank, 372 U.S. 609 (1963) 29

Duro v. Reina, 495 U.S. 676 (1990) 18

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 4, 26

Elk v. Wilkins, 112 U.S. 94 (1884) 2, 3

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 24

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 16

Hafer v. Melo, 502 U.S. 21 (1991) 27

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 26

TABLE OF AUTHORITIES – Continued

Page

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) 18

Iowa Mut al Insurance Co. v. LaPlante, 480 U.S. 9 (1987) 15, 26

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) 7, 23, 24

Lane County v. Oregon, 74 U.S. 71 (1869) 19

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) 29

Maine v. Thiboutot, 448 U.S. 1 (1980) 16

Martinez v. California, 444 U.S. 277 (1980) 17

McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) 3

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 1

Mitchell v. Forsyth, 472 U.S. 511 (1985) 10

Monroe v. Pape, 365 U.S. 167 (1961) 16

Montana Dep't of Transp. v. King, 191 F.3d 1108 (9th Cir. 1999) 3

Montana v. Gilham, 133 F.3d 1133 (9th Cir. 1998) 3

Montana v. United States, 450 U.S. 544 (1981) 4, 6, 11, 12, 15

Montana v. United States EPA, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998) 3

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985) ..... *passim*

New York v. United States, 505 U.S. 144 (1992)...24, 25

Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) 2

TABLE OF AUTHORITIES – Continued

Page

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 6, 10, 11, 13, 22

Printz v. United States, 521 U.S. 898 (1997) 18, 19

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 10

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 18

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 19, 21, 24

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 4, 6, 9, 12, 15, 16

Tafflin v. Levitt, 493 U.S. 455 (1990) 18

Talton v. Mayes, 163 U.S. 376 (1896) 25

Texas v. White, 74 U.S. 700 (1869) 19

United States v. Kagama, 118 U.S. 375 (1886) 23

United States v. Wheeler, 435 U.S. 313 (1978) 6, 10, 11, 14, 15

Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) 22

Westfall v. Erwin, 484 U.S. 292 (1988) 29

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 1, 2

Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996) 4

FEDERAL MATERIALS

United States Constitution

Art. I, § 8, cl. 3 1

Amend. IV 2

Amend. V 15

TABLE OF AUTHORITIES – Continued

Page

Amend. X 1, 7, 19, 24, 25

Amend. XI 7, 24, 25

United States Code
Tit. 8, § 1401(b) 3

Tit. 18, § 1153 15

Tit. 25, § 348 2

Tit. 25, § 1303 10

Tit. 25, §§ 2701 to 2721 25

Tit. 42, § 1983 ..... *passim*

Tit. 42, § 2021e(d)(2)(C) 25

Articles of Confederation
Art. IX, ¶ 4, cl. 3 20

United States Supreme Court Rules
Rule 37.4 1

OTHER STATES' MATERIALS

Nevada Revised Statutes Annotated (Michie 1998)

§ 41-0337 29

§ 41-0339.2 28

§ 41-0348 28

OTHER AUTHORITIES

Bureau of Census, Dep't of Commerce, *1990 Census of Publication, General Population Characteristics, United States* (Nov. 1992) 3

Prucha, Francis Paul, *American Indian Treaties* (1994) 21

TABLE OF AUTHORITIES – Continued

Page

Prucha, Francis Paul, *The Great Father* (1984) 2, 20

2 Joseph Story, *Commentaries on the Constitution of the United States* (3d ed. 1858) 19

The Federalist (Jacob E. Cooke ed., 1961)..... 17

No. 42 (James Madison) 20, 21, 22

No. 82 (Alexander Hamilton) 17

BRIEF AMICUS CURIAE

The States of Montana, et alia, respectfully submit a brief amicus curiae through their respective Attorneys General pursuant to S. Ct. R. 37.4.

INTEREST OF AMICI CURIAE STATES

This Court held in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that Congress lacked authority under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, to subject States to unconsented suit by persons or entities other than the United States or another State. Several Terms later, the Court ruled that Congress was without the power to subject States to such suit in their own courts. *Alden v. Maine*, 527 U.S. 706 (1999). The decision below raises the seemingly anomalous specter of an Indian tribe, even though a "domestic dependent nation [ ] . . . completely under the sovereignty and dominion of the United States" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831)), possessing the authority to do that which Congress cannot. Indeed, because tribes are not constrained by, inter alia, the Tenth Amendment to the United States Constitution, they would have substantially *more* power to regulate the States than does Congress. Remarkably, the Court of Appeals appeared untroubled by that possibility. The amici curiae States, however, are concerned greatly. Their concern is rooted in "the actual state of things" (*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832)) in Indian country today.

As this Court observed in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), with respect to the scope of

state authority on Indian reservations, "[g]eneralizations . . . have become particularly treacherous" because "[t]he conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester* . . . has given way" to a more flexible analytical regime. The breakdown of *Worcester*'s "conceptual clarity" was the inevitable result of changes in congressional and Executive Branch policies that encouraged assimilation of tribal members into nontribal society and the introduction of non-Indians into Indian country. So, for example, this Court held in *Elk v. Wilkins*, 112 U.S. 94, 102 (1884), that "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,)" were not "persons" for purposes of the Fourth Amendment. Three years later, Congress enacted the General Allotment Act, 24 Stat. 388 (1887), whose underlying purpose was "to end tribal land ownership and to substitute private ownership" and thereby facilitate assimilation of tribal members. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976) (emphasis supplied).

In addition to allotting reservation lands to tribal members, the General Allotment Act contained an authorization for the sale to nonmembers of parcels remaining after allotment requirements had been satisfied. 24 Stat. at 389-90 (codified as amended at 25 U.S.C. § 348). The allotment process's effect was immense, with a substantial portion of reservation lands passing out of tribal ownership. *See generally* Francis Paul Prucha, II *The Great Father* 896 (1984) (summarizing the types and amounts of land transfer as of 1934). Accompanying this breakdown of tribal territorial exclusivity was the elimination of tribal members' political separation through individual

grants of citizenship in conjunction with the allotment process and, eventually, the extension of citizenship to all Indians in 1924. Act of June 2, 1924, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)). Over the forty-year period between *Elk* and the 1924 act, therefore, Indian country was transformed.

With this transformation came significantly increased state responsibilities. Large numbers of nonmembers now reside within reservations. Statistics in the 1990 census survey indicate that approximately 800,000 persons resided within Indian reservations or on trust land, of whom only 54.1 percent were identified as American Indian, Eskimo or Aleut. Bureau of Census, Dep't of Commerce, *1990 Census of Publication, General Population Characteristics, United States* 541 (Nov. 1992). Many members also look to States and their political subdivisions to provide governmental services. *See, e.g., McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172-73 (1973). The amici States thus have a substantial presence within Indian country.

This presence has exposed the States increasingly to the exercise, or attempted exercise, of tribal adjudicatory and regulatory authority.[1] While some of these controversies

---

[1] *See Montana Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999) (attempted application of tribal employment relations office ordinance to state highway construction crew); *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (attempt to impose damages liability on county and sheriff department officers with respect to on-reservation arrest of tribal member); *Montana v. United States EPA*, 137 F.3d 1135 (9th Cir.) (challenge to inherent authority of tribe to issue water quality standards applicable to state and local government lands pursuant to a grant of treatment-as-State status under § 518 of the Clean Water Act), *cert. denied*, 525 U.S. 921 (1998); *Montana v. Gilham*, 133 F.3d

have been resolved by reference to principles developed under *Montana v. United States*, 450 U.S. 544 (1981), the fact remains that the amici provide their services throughout reservations both on and off lands as to which tribal "gatekeeping" authority may exist. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 483 n.4 (1999); *Strate v. A-1 Contractors*, 520 U.S. 438, 455-56 (1997). Their unique relationship with reservation residents, whether tribal or nontribal, and the nature of their services simply do not admit to efficient application of *Montana* standards as the sole measure for the scope of inherent tribal authority. This Court's resolution of the core federalism issues raised by the decision below therefore will have profound consequences to the amici States not only with respect to maintaining the integrity of the sovereignty reserved by them under the Constitution but also with respect to discharging their day-to-day governmental responsibilities.

The Ninth Circuit's opinion raises these issues in a stark manner. *First*, the Court of Appeals declined to address the merits of what it characterized as the "affirmative defense of sovereign immunity" (Pet. A-13) interposed by Petitioners and, in so holding, requires States and their officials or employees – at least for the purpose of determining that "affirmative defense" – to appear in a tribal court forum. Such a pre-condition to federal court jurisdiction is unsupported by this Court's reasoning in

---

1133 (9th Cir. 1998) (attempted exercise of tribal court jurisdiction over claim against State seeking damages for negligent highway maintenance); *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996) (attempted exercise of tribal court jurisdiction for the purpose of challenging county's right to collect state property tax).

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985), but, no less importantly, the Court of Appeals' application of the exhaustion doctrine can have a seriously detrimental impact on States through the delay and potential interference with the delivery of their services to reservations. The tribal court proceedings here, as an example, commenced over nine years ago. *Second*, because the Court of Appeals erred in not resolving Petitioners' sovereign immunity defense, this Court should answer the first question presented by Petitioners: whether the Fallon Paiute-Shoshone Tribe's ("Tribe") inherent authority extends to controlling the State of Nevada's sovereign activities. To conclude that the Tribe may regulate directly or indirectly such activities is to ignore the core principle that Congress's plenary power over Indian affairs, which is incompatible with any claim of tribal inherent authority against the United States, was vested in the States and *delegated* to the Federal Government under the Indian Commerce Clause and that such transfer neither did nor could affect the immunity then possessed by the States with respect to the exercise of inherent tribal authority. Because the amici States believe resolution of these issues disposes of Respondent Hicks' tribal court claims, they do not address the third question presented in the Petition.

SUMMARY OF THE ARGUMENT

1. The Court of Appeals erred in requiring Petitioners to exhaust their sovereign immunity claim before tribal courts. Contrary to the lower court's characterization of such claim as simply an "affirmative defense" to

the tribal court's adjudicatory jurisdiction, Petitioners invoke an *absolute* immunity against the attempted exercise of any form of tribal authority. Requiring Petitioners to submit themselves to a tribal forum for the purpose of litigating their claim negates much of the immunity's value. The Ninth Circuit's reliance on *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), for the exhaustion requirement thus was improper because here, as in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), a categorical prohibition is at stake. None of the comity considerations underlying the *National Farmers* exhaustion rule – avoidance of " 'procedural nightmares,' " the tribal court's articulation of "the precise basis for accepting jurisdiction," and the utility of tribal court expertise – has force in the face of such a factually straightforward and federal law-based prohibition. This conclusion is reinforced by *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). There, the Court noted that exhaustion under even the non-categorical rule adopted in *Montana v. United States*, 450 U.S. 544 (1981), is unnecessary when the presumption raised by the presence of *Montana*'s "main rule" exists.

2. Petitioners possess immunity from the application of the Tribe's inherent authority. That conclusion follows from three propositions. First, this Court's decisions in *United States v. Wheeler*, 435 U.S. 313 (1978), and *Strate* establish that inherent tribal authority encompasses only the application of tribal law. Respondent Hicks' claim under 42 U.S.C. § 1983 against Petitioners therefore is foreclosed, but, in any event, Congress has not granted tribal courts jurisdiction concurrent with federal and state courts over such claims.

Second, fundamental federalism principles establish the immunity of the States to inherent tribal authority. Indian tribes are subject to the plenary power of Congress under the Indian Commerce Clause and accordingly have no inherent authority with respect to the United States. Since that plenary power was ceded to the national government by the States themselves, they necessarily possessed immunity against the exercise of inherent tribal authority at the time of the Nation's founding. This federalism-based conclusion is reinforced by the fact that the status of tribes as "domestic dependent nations" derives from application of the discovery doctrine and that the States, in succeeding to the territorial interests of Great Britain, also succeeded to that country's preeminent relationship to Indian tribes within their borders. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 584-85 (1823). The States' cession of power over Indian affairs to Congress under the Indian Commerce Clause, moreover, did not waive their immunity to the exercise of inherent tribal authority. To conclude otherwise means not only to credit the notion that the States' cession intended to grant tribes, who are not subject to the Tenth and Eleventh Amendments or other constraints on federal power imposed under the Constitution, more authority than ceded to Congress but also to ignore the very purpose of the Indian Commerce Clause itself, i.e., to vest a specified power in *Congress*.

Finally, the individual Petitioners partake of Nevada's sovereign immunity because the claims asserted by Respondent Hicks grow out of the performance of duties within the ordinary course of their government employment. That the tribal court suit has been narrowed to claims against them in their personal capacities does not

change this conclusion, since the State is responsible for representing and indemnifying Petitioners and since the effect of prospective or retroactive relief on governmental decision-making is, as a practical matter, the same. Aside from the potential impact of tribal court relief on the State's sovereign activities, a broader rule with respect to the individual Petitioners' immunity than may exist where federal or state law tort claims are involved is warranted in view of the remedies that were available to Respondent Hicks in federal or state court and the non-reviewability of tribal court decisions on the merits.

ARGUMENT

I. PETITIONERS HAVE NO OBLIGATION TO EXHAUST THEIR DEFENSE OF IMMUNITY FROM SUIT. INHERENT IN IMMUNITY IS THE RIGHT NOT TO BE EXPOSED TO PROCEEDINGS IN TRIBAL COURT FOR ANY PURPOSE, AND THE DEFENSE'S DETERMINATION IMPLICATES NONE OF THE COMITY CONSIDERATIONS IDENTIFIED IN *NATIONAL FARMERS*.

The Ninth Circuit construed the tribal court of appeals' decision as not foreclosing Petitioners' sovereign immunity defense and declined to "reach the issue." Pet. A-13. It buttressed its determination on the fact that the tribal court proceeding had been dismissed against the State and the individual Petitioners in their official capacities. *Id.* The court explained in a footnote that it viewed sovereign immunity as an affirmative defense and that "the defense is subject to our tribal court exhaustion rule, even though the issues the defense presents are jurisdictional in nature." Pet. A-23 n.12. The Court of Appeals'

perfunctory application of the exhaustion doctrine formulated in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), not only denigrates the central importance of a State's sovereign immunity against unconsented suit but also misapprehends the prudential underpinnings of *National Farmers*.

1. Although the Court of Appeals described Petitioners' sovereign immunity defense by analogy to the Eleventh Amendment (Pet. A-23 n.12), the "jurisdiction" at stake presently is the exercise of a tribe's inherent authority, and the immunity claim necessarily is directed to *any* form of tribal control not affirmatively delegated by Congress. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). This controversy therefore differs from a traditional immunity inquiry because, in asking whether a tribe may adjudicate a particular dispute, it additionally asks whether the tribe may prescribe the rule of decision itself. *See Seminole Tribe v. Florida*, 517 U.S. 44, 103 (1996) (Souter, J., dissenting) (distinguishing between the use of sovereign immunity as a limitation on "the reach of substantive law" and "on the jurisdiction of the courts"). Simply put, the issue is whether Petitioners must suffer the time, expenditure of resources and potential disruption of sovereign activities in an effort to convince a tribal tribunal that it lacks any form of authority over the State or its representatives with regard to the dispute at hand. Denominating the immunity claim as an "affirmative defense" does not further the task of deciding whether a tribal court exhaustion requirement should be adopted as a matter of comity.

2. a. Because "the essence" of immunity from suit "is its possessor's entitlement not to have to answer for his conduct," that immunity "is effectively lost if a case is

erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 525, 526 (1985); *see also Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) ("*Mitchell* makes clear that the [immunity] defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery . . . , as "[i]nquiries of this kind can be peculiarly disruptive of effective government" '"); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) ("the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice"). So, too, the essence of immunity from the exercise of inherent tribal authority lies not merely in the right to eventual federal court review of an immunity claim but in an entitlement to immediate relief against such exercise. This conclusion follows unavoidably from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *National Farmers*.

b. In *Oliphant* this Court established a per se rule that non-Indians are not subject to tribal criminal jurisdiction. There, as here, "Respondents d[id] not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision" but instead argued that "such jurisdiction flows automatically from the 'Tribe's retained inherent powers of government.' " 435 U.S. at 195-96. There, as here, the non-Indian defendant's claim that the tribe could not prosecute him for lack of inherent authority had not been "exhausted"; he initiated a habeas corpus action under 25 U.S.C. § 1303 after having been charged with a tribal code offense and prior to any determination

either of his guilt or the tribal court's "jurisdiction." 435 U.S. at 194. There, as here with respect to asserting civil authority over state officers, "[t]he effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians . . . [was] a relatively new phenomenon." *Id.* at 196-97. There, as it must here, this Court undertook an analysis ultimately directed to the question whether exercise of the claimed inherent authority was " 'inconsistent with [tribes'] status' " in the aftermath of "ceding their lands to the United States and announcing their dependence on the Federal Government." *Id.* at 208. Lastly, there, as it will be here if sovereign immunity is found, the result reached was categorical. *Id.* at 211 ("[s]uch an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States").

That *Oliphant* precludes requiring Petitioners to exhaust tribal remedies is plain from *National Farmers* itself. This Court emphasized, in fashioning the exhaustion doctrine with respect to challenges to tribal court authority under the less absolute principles enunciated in *Montana v. United States*, 450 U.S. 544 (1981), that the nature of the "jurisdictional" defect in *Oliphant* had demanded a different rule because that defect admitted of no exceptions. *National Farmers*, 471 U.S. at 855 ("the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require"). In the absence of a categorical prohibition, the Court concluded that comity principles warranted adoption of an exhaustion rule which, it believed, would assist in

avoiding " 'procedural nightmare[s]' " through development of a "full record" before the tribal court, "encourag[ing] tribal courts to explain to the parties the precise basis for accepting jurisdiction," and "provid[ing] other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 856-57. None of these factors, however, counsels exhaustion when a categorical prohibition is involved. The sovereign immunity defense is factually straightforward and capable of being litigated without significant exploration of the controversy's merits (*Mitchell*, 472 U.S. at 528-29), while the likely absence of factual dispute and the wholly federal law-based nature of the required inquiry significantly diminish the value either of a tribal court's explanation of the basis for exercising jurisdiction or of its expertise in tribal law.

The prudential nature of the *National Farmers* exhaustion rule was made clear in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), even with respect to *Montana*-based challenges to tribal inherent authority. This Court held in *Strate* that a state highway located within a reservation constituted the functional equivalent of nonmember-owned fee lands for purposes of *Montana*'s "main rule," which presumes the absence of inherent authority where a tribe attempts to regulate through its positive laws or courts the conduct of nonmembers on such lands. *Id.* at 453-56. It concluded the opinion with a footnote discussing the need for exhaustion in situations where the main rule had been shown to apply:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal

> courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. . . . Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay.

Id. at 469 n.14 (citation omitted). Similarly, if Petitioners' position is accepted, a bright-line principle will be established that precludes the exercise of inherent tribal authority over States or their officials and that directs claims of the sort here to federal or state court for determination. While they are the first litigants to present the issue to this Court, Petitioners should not be denied resolution of their claim merely because they are the first. *Oliphant* once more is instructive and, together with the fundamental purpose underlying sovereign immunity – freedom from the burden of responding to another's assertion of authority – compels reversing the Court of Appeals with respect to its exhaustion holding.

II. TRIBAL INHERENT AUTHORITY DOES NOT EXTEND TO REGULATING OR ADJUDICATING THE RIGHTS OF STATES OR THEIR OFFICERS WHEN CARRYING OUT SOVEREIGN RESPONSIBILITIES.

The amended complaint filed by Respondent Hicks alleges five causes of action, four under tribal law and one for violation of his "civil rights under federal law." Pet. I-4. The latter reference is to 42 U.S.C. § 1983. Br. Opp'n Pet. Writ Cert. at 3, 15-16, 24-25. The question is

thus whether the Tribe's inherent authority permits its courts to apply tribal law or § 1983 to impose a monetary damages judgment on the individual Petitioners. The amici States believe that answering this question requires, first, identifying the nature of the law that may be applied by a tribe pursuant to its inherent authority; second, reconciling the reach of such authority with two core principles of federalism – the delegated quality of congressional power under, inter alia, the Indian Commerce Clause and the States' retained sovereignty; and, third, determining whether the individual Petitioners share in Nevada's sovereign immunity although nominally sued in their personal capacities.

1. In *United States v. Wheeler*, 435 U.S. 313 (1978), this Court summarized the nature of inherent tribal authority with particular reference to laws imposing criminal sanctions:

> The powers of Indian tribes are, in general, "inherent powers of a limited sovereign, which have never been extinguished." . . . Before the coming of the Europeans, the tribes were self-governing sovereign political communities. . . . Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws. [¶] Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." . . . Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision

> they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

Id. at 323-24 (citations and footnote omitted); *see also National Farmers*, 471 U.S. at 851 ("tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled North America"). The Court continued on in *Wheeler* to conclude that the dual sovereignty doctrine – which deems successive prosecutions by different sovereigns for the same conduct unaffected by the United States Constitution's double jeopardy prohibition – allowed prosecution of a tribal member under the Major Crimes Act, 18 U.S.C. § 1153, for conduct previously punished by a tribal court, since the tribal proceeding was brought pursuant to the tribe's own laws and thus "not 'for the same offence[ ]' " for Fifth Amendment purposes. 435 U.S. at 330. *Wheeler*'s significance here, aside from an explanation of the source and scope of tribal inherent authority, lies in its recognition that, when acting pursuant to such authority, a tribe is implementing *its own* laws, not those of another sovereign.

This Court in *Strate* made the same point in the civil context. There, the issue was whether a tribal court could exercise "jurisdiction" over claims brought against a nonmember with respect to a motor vehicle accident on a state highway within a reservation. In resolving that issue, the Court was guided by the "pathmarking" decision in *Montana* concerning the scope of inherent tribal authority and, in distinguishing the exhaustion requirement in *National Farmers* and a deferral rule established in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), reasoned:

> These decisions do not expand or stand apart from *Montana*'s instruction on "the inherent sovereign powers of an Indian tribe." . . . While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of "inherent sovereignty." . . . Regarding activity on non-Indian fee land within a reservation, *Montana* delineated . . . the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non-Indians." . . . As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding.

520 U.S. at 453 (citations omitted). Stated alternatively, the authority of tribal courts is limited to applying tribal law as the rule of decision on the merits. A necessary corollary is the lack of any authority to entertain a purely federal law-based claim.

That general principle applies with particular force to Respondent Hicks' cause of action under 42 U.S.C. § 1983. First, § 1983 provides a remedy only for violations of federal constitutional or statutory rights. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980); *Monroe v. Pape*, 365 U.S. 167, 180 (1961). Second, this Court has emphasized that "Congress realized that in enacting § 1983 it was altering the balance of judicial power between the state and federal courts" and that, "in doing so, Congress was adding to the *jurisdiction of the federal courts*, not subtracting from that of the state courts." *Allen v. McCurry*, 449 U.S. 90, 99 (1980) (emphasis supplied). Consequently, while state courts have a general obligation to

enforce the statute (*see, e.g., Martinez v. California*, 444 U.S. 277, 283 n.7 (1980)), that obligation extends only to litigants over whom adjudicatory jurisdiction exists otherwise.[2] Here, even were tribes properly viewed as comparable to States for purposes of enforcing § 1983, the requisite preexisting "jurisdiction" is absent for the reasons developed immediately below.[3]

---

[2] The requirement of preexisting jurisdiction was discussed in an analogous context by Alexander Hamilton in *The Federalist*:

> [T]his doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the state courts have previous cognizance. It is not equally evident in relation to cases that may grow out of, and be *peculiar* to the constitution to be established: For not to allow the state courts a right of jurisdiction in such cases can hardly be considered as the abridgement of a pre-existing authority.

The Federalist No. 82, at 554-55 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). While Hamilton was concerned with particular causes of action, his reasoning plainly applies to instances where the court lacks adjudicatory jurisdiction over a party. *See Claflin v. Houseman*, 93 U.S. 130, 136 (1876) ("[l]egal or equitable rights, acquired under either [the federal or state] system of laws, may be enforced in any court of either sovereignty *competent* to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction") (emphasis supplied).

[3] It bears mention that, even were Petitioners subject to the Tribe's inherent authority, a second consideration animating the concurrent jurisdiction doctrine – the obligation of the *States* to enforce federal law – is irrelevant where a tribal court proceeding is involved. Justice Kennedy thus explained recently:

> It is the right and duty of the States, within their own judiciaries, to interpret and follow the Constitution

2. This Court reiterated in *Printz v. United States*, 521 U.S. 898, 918-19 (1997), that "[i]t is incontestable that the Constitution established a system of 'dual sovereignty' " and that, "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' " *See, e.g., Tafflin*, 493 U.S. at 458 ("[w]e begin with the axiom that, under our federal system, the States possess

---

> and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case. The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity. The Constitution is the basic law of the Nation, a law to which a State's ties are no less intimate than those of the National Government itself.

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 275-76 (1997) (plurality op.). It is from this concept of coordinate sovereignty that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Indian tribes are not situated comparably to States in this respect, both because they did not participate in the surrender of powers from the States to the national government on which the Union rests (*Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991)) and because, unlike the States, they are not bound by the Constitution's provisions (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). Consequently, while tribes or their courts presumably can recognize federal law-based claims where inherent authority otherwise exists over the parties, such recognition is discretionary, i.e., "a matter of comity," unless Congress explicitly has directed them to do so. *See Duro v. Reina*, 495 U.S. 676, 693 (1990) (noting certain requirements imposed on tribal courts under the Indian Civil Rights Act). Section 1983 contains no such direction.

sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause"); *Lane County v. Oregon*, 74 U.S. 71, 76 (1869) ("[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to esparate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States"). The *Printz* Court thus emphasized that "[r]esidual state sovereignty was . . . implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, . . . which implication was rendered express by the Tenth Amendment's assertion that 'the powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people.' " *Id.* at 919; *see generally* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1907, at 682 (3d ed. 1858) (because the Constitution "is an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld"). The twin concepts underlying this principle of "dual sovereignty" – delegation of state power to the national government and retention of that power not delegated – control determination of the question whether Indian tribes may exercise their inherent authority over the States.

a. "The Union of the States," as this Court observed in *Texas v. White*, 74 U.S. 700, 724-25 (1869), "never was a purely artificial and arbitrary relation." It instead initially "began among the Colonies[ ] and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations." *Id.* at 725. It then

"was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation." *Id.* Among those mutual concerns, of course, were Indian affairs. *See generally* I *The Great Father* at 35 ("[t]he individual colonies were well aware of Indian matters, . . . [b]ut the Indian problem could not be handled adequately by disparate provincial practices").

That specific concern was addressed unsatisfactorily in the Articles of Confederation, where the national government was given "the sole and exclusive right and power of . . . regulating the trade, and managing all the affairs with the Indians, not members of any of the States: provided, that the legislative power of any State within its own limits be not infringed or violated." Arts. Confed'n, art. IX, ¶ 4, cl. 3. The concluding proviso, as James Madison pointedly remarked in *The Federalist*, appeared to take back what the prior portion of the clause gave:

> The regulation of commerce with the Indian tribes is very properly unfettered from the two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. . . . And how the trade with Indians, though not members of a State, and yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case where the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to

> reconcile a partial sovereignty in the Union, with a complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part and letting a whole remain.

The Federalist No. 42, at 284-85 (James Madison). The practical consequence of this "unsettled construction of the confederation" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)) was aggressive incursion by some southern States into tribal territory. *See generally* Francis Paul Prucha, *American Indian Treaties* 59 (1994) ("[i]n the south, the difficulties in dealing with the Indians after the Revolutionary War were, if anything, even greater than in the north" because, given lack of clarity over the reach of congressional authority, four States – Virginia, North Carolina, South Carolina and Georgia – "aggressively pushed their own interests; they strove to satisfy the demands of their citizens for more land and were imbued with a strong sense of their state sovereignty").

The Articles of Confederation's inadequacy as to national control of Indian affairs was remedied in the Constitution through the Indian Commerce Clause. *Cherokee Nation*, 30 U.S. (5 Pet.) at 19 ("[i]ntending to *give* the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it granted in the confederation") (emphasis supplied). That this *grant* of power to Congress was broad was highlighted in *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996), where this Court stated:

> [O]ur inquiry is limited to determining whether the Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the

> States. If anything, the Indian Commerce Clause accomplishes a greater *transfer of power* from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

(Emphasis supplied); *see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law"). The breadth of the power transferred can be seen in the Court's decisions which have held repeatedly that congressional authority under the Indian Commerce Clause is plenary. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"). As *Oliphant* and other cases also establish, that plenary power includes the ability to restrict or eliminate inherent tribal authority. *Oliphant*, 435 U.S. at 208; *accord Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 501 (1979). Since Congress has the ability to determine the very scope of tribal powers, no argument can be, or indeed ever has been, made that it is subject to those powers.

Again, however, Congress derived its plenary authority over Indian affairs under the Indian Commerce Clause from the several States. *See The Federalist* No. 42, at 282 (James Madison) (describing Commerce Clause authority as part of the "third class" of powers lodged in the general government). The inference required from the

derivative nature of federal power is that, but for their delegation of authority to regulate commerce "with the Indian tribes," the States would have the same plenary authority. This inference not only comports with the Constitution's structure but also with the doctrinal source of Indian tribes' "anomalous" and "complex" relation to the United States and its people (*United States v. Kagama*, 118 U.S. 375, 381 (1886)): the discovery doctrine.

Under that doctrine, "discovery [of new continents] gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title may be consummated by possession." *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823). Such title "gave to the nation making the discovery the sole right of acquiring the soil from the natives[ ] and establishing settlements upon it." *Id.* "[T]he rights of the original inhabitants," moreover,

> were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the fundamental principle, that discovery gave exclusive title to those who made it.

Id. at 574. As a consequence of this diminished sovereignty, tribes were characterized as "domestic dependent nations" occupying "a territory to which [the United States] assert[s] a title independent of their will" and "in

a state of pupilage" that "resembles a [relation] of a ward to his guardian." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. The States were deemed conceptually no different than the United States for purposes of the discovery doctrine. *Johnson*, 21 U.S. (8 Wheat.) at 584-85 ("[i]t has never been doubted, that either the United States or the several States, had a clear title to all the lands within the boundary lines described in the [1783 Treaty of Paris], and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it"); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., dissenting) ("What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits"). It necessarily follows that, as sovereigns succeeding to Great Britain's territorial interests, the States were possessed of immunity from the exercise of inherent tribal authority at the time of the Constitution's framing.

b. No basis exists on which to conclude that the States' grant of power over Indian affairs to Congress *waived* their preexisting immunity from regulation by the tribes themselves. As an Article I power, the Indian Commerce Clause's exercise is subject to the constraints of not only the Tenth and Eleventh Amendments but also the States' sovereign immunity "inher[ing] in the system of federalism established by the Constitution." *Alden v. Maine*, 527 U.S. 706, 730 (1999); *see also Seminole Tribe*, 517 U.S. at 59-63; *New York v. United States*, 505 U.S. 144, 167-69 (1992). In *Seminole Tribe*, the Court held that the

Eleventh Amendment precluded Congress from subjecting States to unconsented suit by tribes under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 to 2721, while in *Alden* the Court held that congressional abrogation of the States' immunity from private suit in state court under a statute enacted pursuant to Commerce Clause powers was precluded by the absence of " 'compelling evidence' that the States were required to surrender this power [of abrogation] to Congress pursuant to the constitutional design." *Alden*, 527 U.S. at 731. In *New York*, this Court invalidated under the Tenth Amendment a "take title" provision in the Low-Level Radioactive Waste Amendments Act of 1985, 42 U.S.C. § 2021e(d)(2)(C), that required a State or a "compact region" composed of States to take possession of low-level radioactive waste under certain circumstances. In so doing, the Court emphasized that "[w]e have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York*, 505 U.S. at 166.

No like limitations exist under the Constitution with respect to the exercise of inherent authority by Indian tribes. As this Court has long held, tribes are extra-constitutional quasi-sovereigns not constrained by the Bill of Rights (*Talton v. Mayes*, 163 U.S. 376, 384 (1896)) or, presumably, any other provision of the Constitution. *See Blatchford*, 501 U.S. at 782. The lack of such constraint means that a tribe could use its inherent authority to subject States to suit for monetary relief for failing to comply with tribal law or for prospective relief to require compliance with such law. It also means that the nature of the tribal law obligation that may be imposed is

unbounded except to the extent positive federal law forecloses the particular obligation's application – and even there a litigant may be required to present the preemption defense to a tribal forum from whose decision no right of collateral review exists as to merits. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485 n.7 (1999); *Iowa Mutual*, 480 U.S. at 19. States could be directed to provide services they do not currently provide, modify the manner in which they provide services, or cease certain activities that they currently perform within a reservation; i.e., state agencies or officials could be "commandeer[ed]" to carry out tribal objectives or programs. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981). To conclude that the States surrendered their preexisting immunity against the exercise of inherent tribal authority through their cession of power under the Indian Commerce Clause thus means that they intended to expose themselves to greater regulation by tribes than by Congress.

Such a conclusion would tear dual sovereignty notions apart. States would no longer be sovereign except to the extent their sovereignty is diminished by the appropriate exercise of congressional power or their own internal laws. They instead would be subject to broad tribal authority which not only is inapplicable to the Federal Government but also is potentially far more intrusive than that possessed by Congress. No less importantly, such authority would run at direct cross-purposes with the Indian Commerce Clause's objective of vesting *Congress* with the responsibility for adjusting the relationship between States and tribes with respect to Indian country matters.

In sum, the authority conferred by the States upon Congress under the Indian Commerce Clause represents the whole of their cession as to Indian affairs. That clause, in turn, did not abandon the States' preexisting immunity from the exercise of inherent tribal authority. The States' immunity accordingly remains an incident of their sovereign powers.

3. Respondent Hicks' amended tribal court complaint asserted liability against the individual Petitioners in their official and personal capacities. Pet. I-2 (Am. Compl. ¶ 2). Following initiation of the federal district court proceeding, he dismissed in tribal court the claims against Petitioners in their official capacities. Pet. A-5. Respondents contended in their brief opposing the Petition that individual capacity suits are not suits against the State and that the individual Petitioners therefore do not partake of Nevada's sovereign immunity. Br. Opp'n Pet. Writ Cert. at 18-21.

Respondents are incorrect for two reasons. First, an "individual capacity" suit under 42 U.S.C. § 1983 (*see, e.g., Hafer v. Melo*, 502 U.S. 21, 25 (1991)) is unavailable because, as discussed *supra* at 16-17, the tribal court lacks concurrent jurisdiction under that statute. Any such claims instead should be maintained in federal or state court. Second, to the extent individual liability is sought to be imposed under tribal law-based claims, the practical effect of the relief sought, not pleading devices, should control. As this Court recognized in *Alden* with respect to claims directly against States:

> Private suits against nonconsenting States – especially suits for monetary damages – may threaten the financial integrity of the States. It is indisputable that, at the time of the founding,

> many of the States could have been forced into insolvency but for their immunity from private suits for money damages. Even today, unlimited congressional power to authorize suits in state to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. This potential national power would pose a severe and notorious danger to the States and their resources.

Alden, 527 U.S. at 750. The Court also identified "more subtle risks" since the surrender of immunity "carries with it substantial costs to the autonomy, the decision-making ability, and sovereign capacity of the States." *Id.*

Notwithstanding the fact that the relief nominally sought here is against the individual Petitioners in their personal capacities, comparable risks exist because they are entitled statutorily to legal representation and indemnification by Nevada and because the specter of prospective or retroactive liability in this or other contexts may affect the State's exercise of its sovereign responsibilities within the Reservation.[4] "A general [tribal] power to

---

[4] Nevada statutes require the State to provide representation through the "official attorney" when such attorney "has determined that the act or omission on which the action is based appears to be within the course and scope of public duty or employment and appears to have been performed or omitted in good faith." Nev. Rev. Stat. Ann. § 41-0339.2 (Michie 1998). Indemnification for judgments additionally is required except under limited circumstances. *Id.* § 41-0348. The State's direct responsibility is reflected by the obligation that it be named as a defendant, at least where state

authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Alden*, 527 U.S. at 750-51. Much the same reasoning would apply were prospective relief affecting the performance of state responsibilities at issue. *See, e.g., Dugan v. Rank*, 372 U.S. 609, 620 (1963) ("[t]he general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act' ") (citations omitted).

While distinctions between official and personal capacity suits have been recognized with respect to federal and state law-based tort claims seeking only monetary relief (*see, e.g., Westfall v. Erwin*, 484 U.S. 292 (1988); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687-91 (1949)), none of those cases has involved the unique circumstances here – i.e., the attempt by an Indian tribe with no authority to regulate or adjudicate the rights or liability of a State to impose damages on persons admittedly carrying out functions on behalf of the State. Moreover, unlike the ordinary sovereign immunity situation, precluding application of tribal law will not deny Respondent Hicks any otherwise appropriate "direct compensation simply because he had the misfortune to be injured by a [state] official." *Westfall*, 484 U.S. at 295. He

---

law causes of action are involved, when a "tort action arising out of an act or omission within the scope of [the officer's or employee's] public duties or employment" is brought. *Id.* § 41.0337. The individual Petitioners have been provided representation and potential indemnification pursuant to these provisions.

had state or federal forums fully capable of addressing his claims. The issue, in other words, is not "absolute immunity for [state] officials" (*id.*); it is immunity from the use of tribal law or courts to determine the rights and obligations of state employees for actions taken in the course of discharging their official responsibilities. Given the availability of adequate federal or state court remedies, the nonreviewability of tribal court decisions on the merits, and the potential of such decisions to burden or disrupt seriously the provision of state services, sovereign immunity should extend to state officers or employees whenever they are carrying out duties within the scope of their governmental responsibilities.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JOSEPH P. MAZUREK
Attorney General
State of Montana
CLAY R. SMITH
Solicitor
Counsel of Record
HARLEY R. HARRIS
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

November 2000

JAN 19 2001

No. 99-1994

FILED
JAN 19 2001
CLERK

IN THE
Supreme Court of the United States

STATE OF NEVADA; WILLIAMS MOLINI, RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,
Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, HO-CHUNK NATION, LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA, PUEBLO OF ISLETA, AND ST. CROIX CHIPPEWA INDIANS OF WISCONSIN IN SUPPORT OF RESPONDENTS

William R. Perry
Counsel of Record
Douglas B.L. Endreson
Elizabeth L. Rodke
Angelina Y. Okuda-Jacobs
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY
1250 Eye Street N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240

January 19, 2001

Attorneys for Amici Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* TRIBES 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. TRIBAL COURTS RETAIN CIVIL ADJUDICATORY JURISDICTION OVER ACTIONS BETWEEN INDIANS AND NON-INDIANS THAT ARISE ON INDIAN LANDS 4

A. This Court has long held that tribal courts have inherent sovereign authority to adjudicate civil disputes between Indians and non-Indians arising on Indian lands 4

B. The decisions in *Strate* and *Montana* recognize that Indian tribes have inherent sovereign authority to exercise civil jurisdiction over non-Indians on Indian lands 10

C. *Strate* establishes that the main rule of *Montana* and the two *Montana* exceptions only apply to the exercise of tribal inherent sovereign authority over non-Indians on non-Indian-owned fee lands 14

D. In furtherance of the Self-Determination policy Congress has encouraged tribal courts to develop and operate effectively, and recognized that these courts exercise general civil adjudicatory jurisdiction over non-Indians 17

E. The power to adjudicate civil disputes arising on a sovereign's territory, whether involving citizens or non-citizens, is essential to the success of the Self-Determination policy and a necessary attribute of sovereignty for Indian tribes as well as other governments 21

CONCLUSION 25

TABLE OF AUTHORITIES

CASES:

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989) 15

California v. Cabazon Band of Indians, 480 U.S. 202 (1987) 11, 12, 21, 22

Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980) 22

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 25

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 9, 14

Fisher v. District Court, 424 U.S. 382 (1976) 8

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 12

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) ..... *passim*

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 7

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) ..... *passim*

Montana v. United States, 450 U.S. 544 (1981) ..... *passim*

Morris v. Hitchcock, 194 U.S. 384 (1904) 11

National Farmers Union Ins. Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985) ..... *passim*

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983) 2, 11, 13, 21

Oliphant v. Suquamish Indian Tribe,
435 U.S. 191 (1978) 2, 9

Ramah Navajo Sch. Bd. v. Bureau of Revenue,
458 U.S. 832 (1982) 22

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 2, 8

South Dakota v. Bourland,
508 U.S. 679 (1993) 15

Strate v. A-1 Contractors,
520 U.S. 438 (1997) ..... *passim*

Talton v. Mayes,
163 U.S. 376 (1896) 5

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g,
476 U.S. 877 (1986) 7

United States v. Mazurie,
419 U.S. 544 (1975) 12

United States v. Wheeler,
435 U.S. 313 (1978) 4, 9

United States ex rel. Mackey v. Cox,
59 U.S. (18 How.) 100 (1855) 5

Washington v. Confederated Tribes of the Colville Indian Reservation,
447 U.S. 134 (1980) 2, 11, 12, 22

White Mountain Apache Tribe v. Bracker,
448 U.S. 138 (1980) 21

Williams v. Lee,
358 U.S. 217 (1959) ..... *passim*

Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832) 6

STATUTES:

Indian Civil Rights Act of 1968,
25 U.S.C. §§1301 *et seq.* 17

Indian Reorganization Act of 1934,
25 U.S.C. §§ 461 *et seq.* 6

Indian Tribal Justice Act,
25 U.S.C. §§ 3601 *et seq.* ..... *passim*

LEGISLATIVE MATERIALS AND RULES

H. Rep. No. 205, 103d Cong.,
1st Sess. (1993) 18, 19

S. Rep. No. 88, 103d Cong.,
1st Sess. (1993) 18, 19, 20

H.R. Conf. Rep. No. 383, 103d Cong.,
1st Sess (1993) 19

139 Cong. Rec. H10259 (daily ed. Nov. 19, 1993) 18

139 Cong. Rec. S9172 (daily ed. July 21, 1993) 20, 21

Sup. Ct. R. 37.3 1

Sup. Ct. R. 37.6 1

OTHER:

HENRY M. HART, JR. AND ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Eskridge and Frickey, ed. 1994) 25

INTEREST OF *AMICI CURIAE* TRIBES[1]

Amici, Confederated Tribes of the Colville Reservation, Ho-Chunk Nation, Pueblo of Isleta, Lac du Flambeau Band of Lake Superior Chippewa, and St. Croix Chippewa Indians of Wisconsin, respectfully submit this brief *amici curiae* in support of Respondents by and through their attorneys pursuant to Sup. Ct. R. 37.3. *Amici* are all federally-recognized Indian tribes. *Amici* tribes have established tribal courts to enforce applicable law and resolve disputes arising on reservation lands. All *amici* tribes are engaged in efforts to pursue self-determination and self-sufficiency. Non-Indians are frequently present on *amici* tribes' lands as residents, tourists, employees, in connection with leases, contracts, or routine day-to-day interaction with tribal government and enterprises, or as patrons of tribal businesses. With the increased commercial activity occurring on Indian lands in recent years, *amici* have experienced a steady increase in civil cases involving non-Indians in their tribal courts. The tribal courts regularly hear and resolve civil disputes involving non-Indians arising on Indian lands. *Amici* consider recognition of tribal civil adjudicatory jurisdiction essential, indeed critical, to the maintenance of a stable, well-ordered civil society and to their ability to provide a rule of law which governs the expectations of persons and entities living, visiting, and doing business in *amici's* tribal territory. Therefore, *amici* have an interest in a recognition of their sovereign authority to establish and maintain tribal courts to adjudicate civil disputes involving non-Indians that arise on Indian lands.

---

[1] The parties have consented to the filing of this brief in letters that have been submitted to the Clerk. *See* Sup. Ct. R. 37.3(a). Pursuant to Sup. Ct. R. 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. This Court established in *Williams v. Lee*, 358 U.S. 217 (1959) that Indian tribes have retained their power to adjudicate civil disputes between Indians and non-Indians arising on Indian lands. In this regard, it was settled in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) that "the reasoning of *Oliphant [v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)] does not apply" to bar tribal courts from adjudicating civil suits against non-Indian parties. 471 U.S. at 854-55. The Court's statement in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978), that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," thus reflects settled law.

2. This Court's recognition in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) that "tribes retain considerable control over nonmember conduct on tribal land," *id.* at 454, is in accord with *Williams* and is confirmed by the decisions of this Court upholding tribal civil regulatory authority over non-Indians on Indian land. *See, e.g., New Mexico v. Mescalero Apache*, 462 U.S. 324 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). These decisions confirm the existence of tribal civil adjudicatory jurisdiction over non-Indians, for "where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Strate*, 520 U.S. at 453 (quoting *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)). Alternatively, tribal civil jurisdiction over such disputes is sustained by the tribes' power to exclude non-Indians from such lands, which includes the power to condition non-Indian conduct on Indian lands. *Merrion*, 455 U.S. at 144.

3. As the Court in *Strate* made clear, the main rule and exceptions in *Montana v. United States*, 450 U.S. 544 (1981) apply only to claims of tribal civil jurisdiction over non-Indian activity on non-Indian-owned fee land. *Strate*, 520 U.S. at 456-60. The nature of the distinction between non-Indian owned fee land and Indian land is apparent from the *Montana* decision, in which the Court considered the effect of a statute that had taken Indian land to provide it to homesteaders. As to such lands, the Court stated, Congress would not have intended to subject the purchaser to tribal jurisdiction. *Montana*, 450 U.S. at 560 n.9. Similarly, in *Strate*, the Court held that the tribe had lost its right to exercise dominion or control over the right-of-way, which was open to the public as part of the State highway system. *See Strate*, 520 U.S. at 455-56. The distinction reflected in these cases has no application to Indian lands. However, even if one assumes, *arguendo*, that the *Montana* exceptions have some application to Indian lands, tribal civil adjudicatory jurisdiction is sustained under these exceptions for the reasons stated in points 1 and 2 above.

4. Congress has "consistently encouraged the . . . development" of tribal courts. *LaPlante*, 480 U.S. at 14-15 n.6. In 1993, for example, Congress enacted the Indian Tribal Justice Act, 25 U.S.C. §§ 3601 *et seq.*, *inter alia* to provide federal funding support for tribal courts equal to that of equivalent state courts. In the 1993 Act, Congress recognized that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5).

5. Indian tribes are pursuing the federal goals of self-determination and self-sufficiency by seeking to improve the reservation environment for all persons interested in tribal affairs, whether for social, entertainment, community, or business purposes. Their success to date has made the

importance of tribal civil adjudicatory jurisdiction over disputes involving non-Indians arising in tribal territory even more apparent. Such jurisdiction is essential to the tribe's ability to maintain a stable environment for community and business growth, and to the achievement of the Congressional goals of tribal self-determination and tribal self-sufficiency.

ARGUMENT

I. TRIBAL COURTS RETAIN CIVIL ADJUDICATORY JURISDICTION OVER ACTIONS BETWEEN INDIANS AND NON-INDIANS THAT ARISE ON INDIAN LANDS

A. This Court has long held that tribal courts have inherent sovereign authority to adjudicate civil disputes between Indians and non-Indians arising on Indian lands

"Originally the Indian tribes were separate nations within what is now the United States." *Williams v. Lee*, 358 U.S. 217, 218 (1959). As separate nations they "exercised virtually unlimited power over their own members as well as those who were permitted to join their communities." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Then, as now, Indian tribes relied on their inherent sovereignty as a source of power to govern. As the Court explained in *United States v. Wheeler*, 435 U.S. 313 (1978), "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323.

That tribal inherent sovereign authority includes judicial power in civil and criminal matters was decided long ago. In *United States ex rel. Mackey v. Cox*, 59 U.S. (18 How.) 100 (1856), the Court held that letters of administration granted by the Cherokee Nation's probate court were entitled to full faith and credit under the terms of an 1812 Act which authorized persons holding such letters when issued "by the proper authority in any of the United States or the territories thereof," to bring suit in the District of Columbia as if the letters of administration had been granted there. *Id.* at 103. In *Talton v. Mayes*, 163 U.S. 376 (1896), a Cherokee Indian had challenged his murder conviction in tribal court on the ground that he had been indicted by a grand jury consisting of only five jurors in violation of the Fifth Amendment of the U.S. Constitution and the Constitution and laws of the Cherokee Nation. The Court held that the Cherokee Nation's powers of self-government existed prior to the Constitution and were not operated upon by the Fifth Amendment, *id.* at 384, and that the claim made under tribal law "was solely a matter within the jurisdiction of the courts of that nation." *Id.* at 385.

That Indian tribes have retained their power to adjudicate civil disputes between Indians and non-Indians that arise on Indian lands was established in *Williams v. Lee*, which in turn relied principally on the historic decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). As the *Williams* Court explained, *Worcester* arose from Georgia's enactment of laws that sought to prohibit the Cherokee Nation "from enacting laws *or holding courts* and [that] prohibited outsiders from being on the Reservation [without the] . . . permission of the State Governor." *Williams*, 358 U.S. at 218 (emphasis added). "Chief Justice Marshall held that Georgia's assertion of power was invalid. The Cherokee Nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no

right to enter, *but with the assent of the Cherokees themselves*, or in conformity with treaties, and with the acts of Congress." *Id.* at 219 (emphasis added) (quoting *Worcester*, 6 Pet. at 561). The *Williams* Court then held that while the principles of *Worcester* have been modified "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . the basic policy of *Worcester* has remained." *Williams,* 358 U.S. at 219.

Congress had recognized these same principles, the Court further found. In 1834, Congress acted to "assure adequate government of the Indian tribes" by enacting statutes that regulated trade with Indian tribes and organizing a Department of Indian Affairs. *Id.* at 220. A century later, Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*, which sought to "encourage[] tribal governments and courts to become stronger and more highly organized." *Id.* Furthermore, the Court held when Congress has intended to grant the States "the jurisdiction which *Worcester v. Georgia* had denied" it has done so expressly. *Id.* at 221 (footnote omitted).

Applying these principles, *Williams* ruled that the Tribe had exclusive jurisdiction over a civil suit by a non-Indian reservation trader to collect a debt from an Indian, because "the exercise of state jurisdiction . . . would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. In so holding, the Court recognized, relying on *Worcester*, that relations between Indians and non-Indians on tribal territory are properly considered an internal affair of the Tribes, and are subject to the exercise of tribal jurisdiction. "Implicit in these treaty terms, as it was in the treaties with the Cherokees . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Id.* at 221-22. Thus, the

Court held, "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223 (citations omitted). The principles of *Williams* apply whether the plaintiff is an Indian and the defendant a non-Indian, or vice-versa. In both cases, tribal jurisdiction over such disputes is essential to tribal self-government, for the exercise of such jurisdiction is necessary not only to insure the resolution of such conflicts in an efficient, fair and peaceful manner, but also to provide the rule of law which governs the expectations of persons and entities living, visiting and doing business in tribal territory. In the absence of such authority, Indian tribes would be deprived of the power to make the common law that governs sovereign territory and relations between persons and entities – Indians and non-Indian – that are present there. This is a critical element of the right to self-government for any sovereign.[2] *Williams* thus conclusively sustains a tribal court's authority to determine disputes involving a non-Indian party that arise in tribal territory. *See also McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 179 (1973) ("cases applying the *Williams* test have dealt principally with situations involving non-Indians").

The principles of *Williams* have also served as the foundation for this Court's decisions recognizing the importance of the civil jurisdiction of tribal courts. It was well established two decades ago that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal

---

[2] The question of the existence of tribal civil adjudicatory jurisdiction is obviously distinct from the issue of whether a state court has jurisdiction over an Indian's voluntary filing of an action in state court as a plaintiff. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986).

and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (footnote omitted). The protection that *Williams* affords from State jurisdiction also remains in force, as the Court made clear in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). "[S]tate courts may not exercise jurisdiction over disputes arising out of on-reservation conduct – even over matters involving non-Indians – if doing so would 'infring[e] on the right of reservation Indians to make their own laws and be ruled by them.'" *Strate*, 520 U.S. at 452-53 (quoting *Fisher v. District Court*, 424 U.S. 382, 386 (1976) (quoting *Williams*, 359 U.S. at 220)). As these decisions recognize, litigation in a forum other than the tribe's simply "cannot help but unsettle a tribal government's ability to maintain authority." *Santa Clara Pueblo*, 436 U.S. at 60.

The policy of *Williams* is further reflected in the tribal court exhaustion rule announced by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and reaffirmed in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Court concluded in *LaPlante* that the assumption of jurisdiction over reservation affairs "by any nontribal court . . . infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *LaPlante*, 480 U.S. at 16. In order to further the federal policies of tribal self-government and self-determination, the orderly administration of justice, and to secure the benefits of the tribal court's expertise, the exhaustion rule requires that challenges to tribal court jurisdiction be heard first in tribal court. *See National Farmers Union*, 471 U.S. at 856-58.

As *Santa Clara Pueblo* and the exhaustion rule cases confirm, tribal courts have the authority and responsibility to decide questions of federal law, including claims under the Indian Civil Rights Act, *Santa Clara Pueblo*, 436 U.S. at 65-66, and federal law challenges to the subject matter jurisdiction

of tribal courts. As the Court explained in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law . . . ." *Id.* at 485 n.7.

It is also clear that the jurisdiction of tribal courts over non-Indians in civil matters is not limited as it is in criminal cases. As the Court held in *National Farmers Union*, "[f]or several reasons . . . the reasoning of *Oliphant* [*v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)] does not apply" to bar tribal courts from adjudicating civil suits against non-Indians. *National Farmers Union,* 471 U.S. at 854. The Court reaffirmed this holding in *LaPlante*, 480 U.S. at 15. As the Court explained in *National Farmers Union*, while Congress created federal criminal jurisdiction over non-Indians committing crimes on reservations, "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." *National Farmers Union*, 471 U.S. at 854 (footnote omitted). Furthermore, the Court observed that the Attorney General's Opinion of the mid-nineteenth century relied on in *Oliphant* had concluded that tribes had no criminal jurisdiction over non-Indians but did retain the power to determine civil controversies arising on their reservations. *Id.* at 854-55.

The decisions of this Court thus establish that Indian tribes retain the full scope of their civil jurisdiction over non-Indian activity on Indian lands, and that this is an "aspect[] of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323 (citation omitted). *Williams* recognizes, as does *Worcester*, that control of non-Indian conduct on Indian lands is within the scope of a tribe's internal affairs, over which tribal authority is retained and that the exercise of tribal civil adjudicatory jurisdiction over disputes

between Indians and non-Indians arising on Indian lands is essential to tribal self-government. *Williams*, 358 U.S. at 221-23. Indian tribes were certainly not divested of this authority by treaty, as *Williams* and *Worcester* show. Nor is there any basis for such a claim in the federal statutes – to the contrary, as we show *infra*, Congress has been steadfast in its support for tribal courts, and has recognized their jurisdiction over Indians and non-Indians. Indeed, the Court in *LaPlante* expressly rejected a claim that the federal grant of diversity jurisdiction had limited the civil jurisdiction of tribal courts, *LaPlante*, 480 U.S. at 18, a holding which *Strate* reaffirms. *See Strate*, 520 U.S. at 452. Finally, as we have shown, settled law makes clear that Indian tribes have not been implicitly divested of their civil jurisdiction over suits against non-Indians pursuant to the principles of *Oliphant*. *See LaPlante*, 480 U.S. at 15; *National Farmers Union*, 471 U.S. at 854-55.

B. The decisions in *Strate* and *Montana* recognize that Indian tribes have inherent sovereign authority to exercise civil jurisdiction over non-Indians on Indian lands

The decisions in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and *Montana v. United States*, 450 U.S. 544 (1981) both expressly recognize that tribal civil jurisdiction extends over non-Indians on Indian lands. In *Montana*, the Court held that it could "readily agree" with the ruling of the Court of Appeals "that the Tribe may prohibit nonmembers from hunting and fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." *Montana*, 450 U.S. at 557. In *Strate*, the Court reaffirmed this ruling and the broader principle that "tribes retain considerable control over nonmember conduct on tribal land." *Strate*, 520 U.S. at 454 (footnote omitted).

The Court's conclusions reflect well-settled law. As we have shown above, *Williams* establishes that tribal inherent sovereign power to adjudicate civil disputes involving Indians and non-Indians on Indian lands has been retained. The Court has also made clear that Indian tribes have broad civil regulatory authority over non-Indian activity on Indian lands. As the Court held in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), "tribes have the power to manage the use of their territory and resources by both members and nonmembers . . . to undertake and regulate economic activity within the reservation . . . and to defray the cost of governmental services by levying taxes." *Id.* at 335-36 (citations omitted). Indeed, in *Mescalero*, the Court expressly relied on *Montana* in upholding tribal power to regulate the use of tribal lands and resources, including wildlife, on tribal territory. *Id.* at 337. In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982) and *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), the Court upheld tribal inherent sovereign authority to tax non-Indian activity on tribal land.[3] In addition, in *California v. Cabazon*

---

[3] These cases followed and relied on the Court's earlier decision sustaining a tribal permit tax imposed on non-Indians in *Morris v. Hitchcock*, 194 U.S. 384 (1904). *See Merrion*, 455 U.S. at 142; *Colville*, 447 U.S. at 153.

The Court in *Colville* relied upon opinions by "Executive Branch officials . . . [that] consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest," *id.* at 152, and observed that "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity" and that "[n]o federal statute . . . shows any congressional departure from this view." *Id.* at 153. The Court held that "[i]n these respects the present cases differ sharply from *Oliphant* . . . in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians." *Id.*

Band of Indians, 480 U.S. 202 (1987), the Court specifically upheld the power of Indian tribes to conduct gaming activities on Indian lands free from state jurisdiction and control. *Id.* at 221-22. These cases make clear, as the Court held in *United States v. Mazurie*, 419 U.S. 544 (1975), that Indian tribes "are unique aggregations possessing attributes of sovereignty over both their members *and their territory*." *Id.* at 557 (emphasis added).

The broad scope of tribal civil regulatory jurisdiction recognized by these decisions confirms the existence of tribal civil adjudicatory jurisdiction over disputes between Indians and non-Indians arising on Indian lands. In *Strate*, the Court recognized the broad scope of tribal civil adjudicatory jurisdiction by holding that "where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Strate*, 520 U.S. at 453 (quoting *LaPlante*, 480 U.S. at 18).

Thus, when nonmembers are engaged in activities on Indian lands over which tribal regulatory authority extends, whether these activities involve entertainment as in *Cabazon*, recreation as in *Mescalero*, consumer sales as in *Colville*, commercial transactions as in *Merrion*, or participation in internal tribal relations, as in *Williams* and *Santa Clara*, their activities are within the scope of the tribes' civil adjudicatory jurisdiction. Indeed, the role of the court in such disputes is that of a neutral arbiter, rather than active like a legislature, regulatory body or criminal prosecutor. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) ("[legislative jurisdiction] refers to the 'authority of a state to make its law applicable to persons or activities', and is quite a separate

---

Thus, the Court concluded in *Colville* that tribal civil powers to tax "are not implicitly divested by virtue of the tribes' dependent status." *Id.*

matter from 'jurisdiction to adjudicate'") (Scalia, J., dissenting) (citations omitted).

When disputes arise from non-Indian presence in connection with these activities, whether sounding in tort, contract, arising under a statute or otherwise, the power of the tribal court to resolve such disputes is recognized. Non-Indians entering a reservation depend upon the existence of a stable legal system and tribal court to resolve any civil dispute that may arise concerning their activities. The provision of such a system, like "police protection and other governmental services" is part of "the advantages of a civilized society that are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137-38 (citations and internal quotations omitted). In sum, that power, like the power to tax, is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.* at 137.

Tribal power to adjudicate civil disputes that arise on Indian lands is also sustained by the tribes' civil regulatory power to exclude non-Indians from such lands. That power includes the authority to condition non-Indian entry onto Indian lands. *See Mescalero*, 462 U.S. at 333. "Nonmembers who lawfully enter tribal lands remain subject to the power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion*, 455 U.S. at 144. Tribal civil adjudicatory jurisdiction over non-Indians may therefore be sustained as a condition to non-Indian entry, presence and conduct on Indian lands. This condition is plainly reasonable – anyone entering the territory of another sovereign surely expects that disputes arising from their activities will be subject to adjudication in the courts of that sovereign. And anyone desiring to avoid being subject to such authority may decline to enter such lands.

C. *Strate* establishes that the main rule of *Montana* and the two *Montana* exceptions only apply to the exercise of tribal inherent sovereign authority over non-Indians on non-Indian-owned fee lands

While recognizing tribal civil jurisdiction over non-Indians on Indian lands, *Strate* and *Montana* both rejected claims of tribal civil jurisdiction over non-Indian activity on non-Indian-owned fee land. *Strate*, 520 U.S. at 456-60; *Montana*, 450 U.S. at 563-567. In so doing, the Court made clear that *Montana*'s main rule and exceptions apply only to claims arising on non-Indian-owned fee lands.

As the Court in *Strate* made clear, *Montana* "describes a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers *on non-Indian land within a reservation*, subject to two exceptions." *Strate*, 520 U.S. at 446 (emphasis added). The Court applied *Montana* based on its prior determination that "the right-of-way, for the purpose at hand [is aligned] with land alienated to non-Indians." *Id.* at 456. On this basis, the Court held that "[o]ur decision in *Montana*, accordingly, governs this case." *Id.* *Strate* thus confirms that "*[r]egarding activity on non-Indian fee land, Montana* delineated – in a main rule and exceptions – the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over non-Indians.'" *Id.* at 453 (emphasis added) (internal citations omitted).

Even if *Strate* had not made this clear, there is certainly nothing in *Montana* to suggest that either the main rule or the exceptions apply to determine the scope of tribal authority over non-Indian activity *on Indian lands*. The *Montana* Court plainly did not apply either the main rule or the exceptions in concluding that tribal power extends to such activity on Indian lands. *Montana*, 450 U.S. at 557. Finally, if more were needed, the decision in *El Paso Natural Gas Co. v. Neztsosie*,

526 U.S. 473 (1999), confirms that *Strate*, and hence *Montana*, apply only to situations involving non-Indian owned fee land. As Justice Souter stated for a unanimous Court "*Strate* dealt [only] with claims against non-members arising on state highways." *Id.* at 482 n.4.

More fundamentally, the Court's rulings in *Williams*, *Mescalero*, *Merrion*, *Colville*, and *Cabazon* establish that on Indian lands, tribal civil jurisdiction exists over Indians and non-Indians alike, and is an element of the tribes' inherent sovereign authority. These cases show that on such lands, there is simply no basis for the contention that tribal inherent power in civil matters has been curtailed. In sum, on Indian lands the existence of tribal civil jurisdiction reflects well-settled law, and is part of the expectations of Indians and non-Indians alike.

Furthermore, the distinction made in *Montana* and *Strate* between Indian land and non-Indian owned fee land is clear from these decisions, as well as in those in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *South Dakota v. Bourland*, 508 U.S. 679 (1993).[4] In *Montana*, *Brendale* and *Bourland*, the Court considered statutes by which Congress had taken Indian land for the specific purpose of opening reservations to homesteaders or taking lands for flood control projects. The Court concluded in these cases that Congress had also divested tribes of regulatory control over non-Indians on these lands, relying on congressional intent in those statutes. *E.g.*, *Montana*, 450 U.S. at 559-61; *Brendale*, 492 U.S. at 422-23 (opinion of Justice White), 435-37, 441-42, 446-47 (opinion of Justice Stevens); *Bourland*, 508 U.S. at 689-94. For example,

---

[4] These decisions confirm that tribal civil jurisdiction over non-Indian activity on non-Indian owned fee land may be shown under the *Montana* exceptions. *Strate*, 520 U.S. at 456-60; *Montana*, 450 U.S. at 565-67; *Bourland*, 508 U.S. at 695-96; *Brendale*, 492 U.S. at 443-44, 456-59.

as the Court explained in *Montana*, Congress would not have intended "that non-Indians purchasing allotted lands would become subject to tribal jurisdiction. . . ." *Montana*, 450 U.S. at 560 n.9. Similarly, in *Strate*, the Court's holding that the highway right-of-way on which the claim arose was the equivalent of non-Indian-owned fee land for purposes of the jurisdictional issue turned on the Court's determination that the right-of-way was congressionally-authorized and had been issued with tribal consent, that the tribe had lost its right to exercise dominion or control over the right-of-way, and that the right-of-way was open to the public as part of the State highway system. *Strate*, 520 U.S. at 455-56. None of the circumstances present in these cases have application to Indian lands, where the rule is otherwise.

However, even if one assumes, *arguendo*, that the *Montana* exceptions have some application to claims of tribal civil adjudicatory jurisdiction over claims arising from non-Indian activity on Indian land, the exercise of this jurisdiction is authorized here.

The first *Montana* exception "covers 'activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Strate*, 520 U.S. at 456-57 (quoting *Montana*, 450 U.S. at 565). If "consensual relationships" are required for a tribal court to exercise jurisdiction over a civil case arising on Indian land, then the consensual presence of non-Indians on Indian land establishes such a relationship, and authorizes the exercise of civil adjudicatory jurisdiction for the reasons shown *supra* at 4-13. The second exception, concerning "conduct that 'threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe,'" *id.* at 457 (quoting *Montana*, 450 U.S. at 566), is also satisfied when a dispute arises on Indian land. This is confirmed by the *Strate* Court's reliance on *Williams* to

illustrate a case in which the exercise of tribal jurisdiction is authorized by the second exception. *Strate*, 520 U.S. at 458-59. For the reasons shown *supra* at 4-10, the exercise of tribal civil adjudicatory jurisdiction over claims arising on Indian lands is necessary to preserve the right of reservation Indians to make their own laws and be ruled by them and is thus authorized by the second exception.

D. In furtherance of the Self-Determination policy Congress has encouraged tribal courts to develop and operate effectively, and recognized that these courts exercise general civil adjudicatory jurisdiction over non-Indians

As the Court acknowledged in *LaPlante*, "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." *LaPlante*, 480 U.S. at 14-15. In 1934, when Congress enacted the Indian Reorganization Act, federal policy "encouraged tribal governments and courts to become stronger and more highly organized." *Williams*, 358 U.S. at 220. Congress later enacted the Indian Civil Rights Act of 1968, 25 U.S.C. §1301 *et seq.*, which requires tribal courts to adhere to most requirements of the Bill of Rights and the Fourteenth Amendment, provides special training for tribal judges and directs the Interior Department to prepare a model code to govern the tribes' administration of justice. *Id.* §§ 1302, 1311.

In 1993, Congress enacted the Indian Tribal Justice Act ("ITJA"), 25 U.S.C. § 3601 *et seq.*, which established the Office of Tribal Justice Support within the Bureau of Indian Affairs to provide funds, training and technical assistance to tribal court systems. *Id.* § 3611. The Act also established a new system for base support funding for tribal justice systems, *id.* § 3613, and authorized $50 million a year to be appropriated for this purpose, *id.* § 3621(b) – which was about four times the

size of prior federal support provided to tribal courts. *See* H.R. Rep. No. 205, 103d Cong., 1st Sess. 27 (1993) (hereinafter "House Report"); S. Rep. No. 88, 103d Cong., 1st Sess. 3 (1993) (hereinafter "Senate Report"). The increase in funding implements recommendations of the United States Commission on Civil Rights that spending for tribal courts be authorized in amounts equal to that of equivalent state courts. *See* 139 Cong. Rec. H10259, H10262 (daily ed. Nov. 19, 1993) (statement of Rep. Miller, Chairman, House Committee on Interior and Insular Affairs). In addition, $7,000,000 per year was authorized to assist tribal courts in developing tribal codes and rules of procedure, tribal court administrative procedures and court records management systems, and tribal standards for judicial administration and conduct. *See* 25 U.S.C. §§ 3611(e), 3621(a).

In enacting the ITJA, Congress found that "Indian tribes possess the inherent authority to establish . . . tribal justice systems" and that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. § 3601(4), (6). As the Senate Report shows, the latter finding "was added to emphasize that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." Senate Report at 8. The House Report reflects the same understanding, stating that:

> As for non-criminal jurisdiction, Indian tribes have the inherent right to exercise civil jurisdiction within the territory it [sic] controls. Tribes exercise a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. Hence, non-Indians may be sued in tribal court. . . .

> The general rule is civil jurisdiction 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.' *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. (1987) at 18.

House Report at 8-9.[5]

When it enacted the Indian Tribal Justice Act, Congress further found that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5). The Senate Committee on Indian Affairs added this finding:

> [T]o reflect the decision of the United States Supreme Court in the case of *Montana v. United States*, 450 U.S. 544 (1981), with regard to the authority of Indian tribal governments to provide for the protection of the health and safety of reservation residents and the political integrity of the tribe. From all of the testimony presented to the

---

[5] The Conference Committee Report likewise stated:

> The Conferees recognize the long standing principle that Indian tribes retain all sovereign authority not expressly divested by the Congress. This principle was articulated by the Supreme Court in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Supreme Court recognized that civil jurisdiction on an Indian reservation "presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. 9 (1987) at 18.

H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (footnote omitted).

> Committee, it is clear that tribal justice systems are an integral part of the efforts of Indian tribal governments to exercise that authority.

Senate Report at 8.

More broadly, the Senate Report concluded that:

> Tribal justice systems are critical to the maintenance and enhancement of the inherent and delegated sovereignty of tribal governments. Except when the Congress has established that federal jurisdiction is exclusive, tribal courts hear cases on virtually all aspects of governmental and private activity. . . .
>
> It is the Committee's view that strong tribal justice systems are necessary both as a function of the exercise of tribal sovereignty and as a means to assure the fair and just administration of the laws enacted by tribal governing bodies and laws enacted by the Congress that require implementation by tribal governments.

Senate Report at 3. As Senator Inouye, Chairman of the Senate Indian Committee, told the Senate when he presented the Indian Tribal Justice Act to the floor:

> While it is a bill that reflects compromise, more fundamentally, it represents the preservation of the sovereign authority of tribal governments to determine the future of their tribal justice systems. Sovereign nations, no matter how limited or expansive their sovereignty might be, can only exercise that

> sovereignty through the legal systems they develop to implement civil and criminal codes and to enforce regulatory provisions.

139 Cong. Rec. S9172, S9176 (daily ed. July 21, 1993).

As these enactments show, Congress has repeatedly recognized that tribal courts play a critical role in tribal self-government, and has encouraged and funded their development, enacted procedural protections which are enforceable in tribal courts, and recognized that tribal civil jurisdiction extends to Indian and non-Indians alike.

E. The power to adjudicate civil disputes arising on a sovereign's territory, whether involving citizens or non-citizens, is essential to the success of the Self-Determination policy and a necessary attribute of sovereignty for Indian tribes as well as other governments

As the Court noted in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), Congress has enacted numerous statutes in furtherance of "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* at 216 & n.19; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 & n.17 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 138, 143-44 (1980). As the Court further recognized in *Cabazon*, "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." 480 U.S. at 219. Indian tribes today are pursuing these goals by developing tribal enterprises, improving the delivery of services to reservation residents and businesses, and enacting laws to provide a stable environment for the growth of the reservation residential and business communities.

All *amici* tribes are engaged in efforts to pursue self-determination and self-sufficiency. All *amici* tribes employ Indians and non-Indians in tribal government positions as well as in tribal enterprises. Indeed, approximately 75-80 percent of the workforce of the *amicus* Ho-Chunk Nation is non-Indian. The *amici* tribes also operate gaming casinos as well as entertainment and recreational establishments on reservation lands. *Cf. California v. Cabazon Band*, 480 U.S. 202 (1987). *Amicus* Confederated Tribes of the Colville Reservation also operate numerous enterprises related to its timber resources which employ hundreds of individuals on the Reservation, including non-Indians. In addition, private businesses of different kinds are located on reservation lands of *amici* Pueblo of Isleta and Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin. Furthermore, all *amici* tribes engage in various commercial and consumer transactions with non-Indians on reservation lands. *Cf. Central Machinery Co. v. Arizona Tax Comm'n,* 448 U.S. 160 (1980); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). The Colville Tribes also frequently enter into contracts with non-Indian business on the Reservation in connection with their forestry enterprises. The *amici* tribes also promote tourism, *see e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), which brings Indian and non-Indians alike to their reservation lands. In addition, many residents of *amici's* reservations are non-Indians or Indians of other tribes who have married tribal members.

These actions are improving the environment for the many and growing number of persons and businesses with an interest in reservation activities for social, entertainment, community, and business purposes. At the same time, as participation in

reservation activities by Indians and non-Indians increases, the importance of tribal civil adjudicatory jurisdiction over disputes arising from these activities becomes more apparent. The exercise of tribal jurisdiction over disputes arising in tribal territory is essential to the tribe's ability to make and apply the law governing relations between Indians and non-Indians on Indian lands. A stable reservation legal environment where civil disputes can be fairly and efficiently resolved is also essential to the achievement of the Congressional goals of tribal self-determination and tribal self-sufficiency. Absent such an environment, tribes will be unable to attract non-Indians to engage in business transactions, patronize tribal enterprises, pursue recreational and tourist activities in tribal territory, and thereby fulfill the congressional purposes. Congress enacted the Indian Tribal Justice Act to promote the resolution of such disputes in tribal courts in an effective and predictable fashion. *See* 25 U.S.C. § 3601(4), (5) and (6).

This is why the *amici* tribes have found it essential to establish tribal courts with general jurisdiction to resolve civil disputes brought before them that arise on the reservation. On all of *amici* tribes' reservations, the tribal courts, including appellate courts, regularly adjudicate cases involving non-Indian parties as plaintiffs and defendants. For example, since 1995, approximately 891 civil cases have been filed in the Tribal Court of the Pueblo of Isleta. In 157 of these cases one of the parties was a non-Indian. Of these 157 cases, 65 were settled out of court, and 51 were resolved in favor of the non-Indian party. Over the same period, 804 civil cases were filed in the Tribal Courts of the Ho-Chunk Nation, which does not generally distinguish between cases filed by members and nonmembers, but which has confirmed that nonmembers appear as plaintiffs and defendants in its courts. The cases filed include general civil matters, child support and domestic violence cases. The State has also appeared as the plaintiff in

the tribal courts of the *amici* Lac du Flambeau Band, Pueblo of Isleta and Ho-Chunk Nation. These cases involve matters such as enforcement of state court orders, garnishment actions, and child support. The *amicus* Colville Tribes have an agreement with the State of Washington providing for modification and enforcement of child support awards against tribal members in tribal court, as a result of which the State appears as plaintiff in numerous cases in tribal court. County child support agencies also frequently appear before the Tribal Court of the Ho-Chunk Nation. Many, if not most, judges in the tribal courts maintained by *amici* are lawyers.

As these caseloads indicate, non-Indians who enter a reservation to do business with a tribe, those who reside on the reservation, and the States as well, depend upon the tribal court to resolve civil disputes that arise from their activities and responsibilities. In these cases, evidence needed for trial is commonly located on the reservation, often far from (and, indeed, beyond the subpoena powers of) the nearest state court. For example, on the Colville Reservation the tribal court is significantly closer to most locations on the Reservation than state courts, which are located as far as fifty miles from the Reservation boundary.

The actions of Congress and this Court protecting the authority of tribes to establish courts exercising general civil adjudicatory jurisdiction over reservations are further complemented by this Court's more general recognition of the interests any sovereign has in providing a forum for resolution of disputes arising on that sovereign's territory but involving non-citizens. Chief Justice Marshall long ago noted the importance to the functions of a government of making courts available for the resolution of disputes and enforcing the law, observing:

> No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts, rather than on others.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387-88 (1821); *see also* HENRY M. HART, JR. AND ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 342-43 (Eskridge and Frickey, ed. 1994) (noting the dispute settlement function of courts is important "to the good ordering of society"). These concerns are as important to Indian tribes as they are to any government.

CONCLUSION

This Court's established tradition of sustaining tribal court civil adjudicatory authority over cases involving non-Indians, Congress' understanding and treatment of tribal civil adjudicatory jurisdiction and its specific actions supporting and strengthening tribal courts, and the fundamental importance of tribal courts to the successful implementation of the self-determination policy and to the exercise of tribal self-government all compel the conclusion that the Fallon Paiute-Shoshone Tribal Court has inherent tribal sovereignty to exercise civil adjudicatory jurisdiction over the proceedings before it.

For the foregoing reasons, *amici* urge this Court to affirm the decision of the Ninth Circuit in this case.

Respectfully submitted,

William R. Perry
Counsel of Record
Douglas B.L. Endreson
Elizabeth L. Rodke
Angelina Y. Okuda-Jacobs
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY
1250 Eye Street N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240

Attorneys for Amici Curiae

January 19, 2001

JAN 19 2001

No. 99-1994

JAN 19 2001

In The

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,

Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; HONORABLE JOSEPH VAN WALRAVEN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE THLOPTHLOCCO TRIBAL TOWN & THE SAC AND FOX NATION AS AMICI CURIAE SUPPORTING AFFIRMANCE FOR RESPONDENT, FALLON PAIUTE-SHOSHONE TRIBES, HONORABLE JOSEPH N. WALRAVEN

D. MICHAEL MCBRIDE III*
**Counsel of Record*
Counsel for the Thlopthlocco Tribal Town & Attorney General and General Counsel for the Sac and Fox Nation
STEVEN K. BALMAN
SNEED LANG, P.C.
2300 Williams Center Tower II
Two West Second Street
Tulsa, OK 74103-3136
(918) 583-3145

January, 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

INTERESTS OF AMICI SUPPORTING FALLON PAIUTE-SHOSHONE TRIBES, HON. JOSEPH N. WALLRAVEN 1

SUMMARY OF ARGUMENT 3

ARGUMENT AND AUTHORITIES 8

I. Indian tribal courts have jurisdiction over claims brought by a tribal member against non-Indians in their individual capacities when the conduct arises on the reservation, and on trust land 8

A. Tribes retain inherent sovereign territorial power in civil cases unless Congress limits those tribal adjudicatory powers or tribes affirmatively relinquish control over their territory 8

B. The Court should uphold the prudential rule of presumptive deference to tribal courts to adjudicate civil disputes arising in Indian country involving tribal members and non-members in the first instance 15

C. The Court should defer to Congress' power to alter allocations of tribal adjudicatory authority 21

II. This dispute does not implicate Eleventh Amendment considerations 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) 10

Bryan v. Itasia Co., 426 U.S. 373 (1976) 22

Burns v. Reed, 500 U.S. 478 (1991) 29

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 24

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 22

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 22, 28

DeCoteau v. District County Court, 420 U.S. 425 (1975) 10

Duro v. Reina, 495 U.S. 191 (1990) 5, 10, 26

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 7, 10, 21

Ex Parte Crow Dog, 109 U.S. 556 (1883) 25

Fisher v. District Court, 424 U.S. 382 (1976) 12

Fogarty v. Fantasy, Inc., 510 U.S. 517 (1994) 27

Hafer v. Melo, 502 U.S. 21 (1991) 29

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 6

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 5, 10, 12, 18, 19, 21

Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823) 24

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) 10

TABLE OF AUTHORITIES – Continued

Page

Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc., 523 U.S. 751 (1998) 23

Lindahl v. Office of Personnel Management, 470 U.S. 768 (1985) 27

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 22

Lorillard v. Pons, 434 U.S. 575 (1978) 27

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 10

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 6, 9, 10, 11, 12, 15

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1980) 22

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 10

Montana v. United States, 450 U.S. 544 (1981) 2, 10, 12, 13

Morton v. Mancari, 417 U.S. 535 (1974) 23, 24

National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) ..... *passim*

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 489 U.S. 505 (1991) 24

Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993) 10, 11, 14

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 8, 11, 13

Patterson v. McClean Credit Union, 485 U.S. 617 (1988) 7

TABLE OF AUTHORITIES – Continued

Page

Patterson v. McClean Credit Union, 491 U.S. 164 (1989) 7

Payne v. Tennessee, 501 U.S. 808 (1991) 7

Rice v. Olson, 324 U.S. 786 (1945) 14

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ...*passim*

South Dakota v. Bourland, 508 U.S. 679 (1993) 10

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 2, 10, 11, 12, 13

Talton v. Mayes, 163 U.S. 376 (1896) 9, 25

United States v. Kagama, 118 U.S. 375 (1886) 22, 25

United States v. Mazurie, 419 U.S. 544 (1975) 10

United States v. Mitchell, 445 U.S. 535 (1980) 24

United States v. Sandoval, 231 U.S. 28 (1913) 22

United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1941) 22

United States v. U.S. Fidelity Co., 309 U.S. 506 (1940) 8

United States v. Wheeler, 435 U.S. 313 (1978) 8, 9

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) 10, 11, 14, 25

Weinberger v. Salfi, 422 U.S. 749 (1975) 18

Williams v. Lee, 358 U.S. 217 (1959) ..... *passim*

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 9, 22

Ex Parte Young, 209 U.S. 123 (1908) 2

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

CONSTITUTION OF THE KAW NATION, ART. VI, Sec. 2 3

CONSTITUTION OF THE SAC AND FOX NATION, ART. X, Sec. 2 3

CONSTITUTION AND BYLAWS OF THE THLOPTHLOCCO TRIBAL TOWN, ART. I, Sec. 2 3

U.S. CONST. Art. I, § 8, cl. 3 ..... 4, 21

U.S. CONST. Sect. 2, cl. 3 21

U.S. CONST. amend. V 2

U.S. CONST. amend. XI 6, 7, 28, 29

U.S. CONST. amend. XIV 2, 21

STATUTES & RULES

12 Cherokee Nation Code Annotated (C.N.C.A.) § 1 (1993) 21

18 U.S.C. § 1153 25

25 U.S.C. §§ 1321(a), 1322(a) (1983 & 2000 Supp.) 20

25 U.S.C. § 1323 (1983 & 2000 Supp.) 20

Act of Mar. 3, 1885, ch. 341, Sec. 9, 23 Stat. 388 25

Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 20

Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 26

Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 26

TABLE OF AUTHORITIES – Continued

Page

Indian Reorganization Act of 1934,
25 U.S.C. 476 *et seq.* 24, 27

Indian Civil Rights Act of 1968,
25 U.S.C. 1301 *et seq.* 26, 27

25 U.S.C. § 1302 ..... 2, 26

Pub. L. No. 90-284, Title IV, 82 Stat. 73 (1968) 20

Indian Child Welfare Act of 1978,
25 U.S.C. 1901 *et seq.* 25

Indian Self-Determination and Education Assistance Act of 1975,
25 U.S.C. 450 *et seq.* 27

Indian Tribal Justice Act,
25 U.S.C. § 3601 ..... *passim*

Indian Tribal Justice Technical and Legal Assistance Act of 2000,
§§ 2, 101, 106, 201, 202, Pub. L. No. 106-559, 114 Stat. 2778 18

Major Crimes Act,
18 U.S.C. § 1151 ..... 10, 25

Nev. Rev. Stat. § 41.430 (1999) 20

OTHER AUTHORITY

40 FED. REG. 27,501 (1975) 20

53 FED. REG. 5837 (1988) 20

H.R. Conf. Rep. No. 383, 103rd Cong., 1st Sess. 13 (1993) 5

S. Rep. No. 88, 103rd Cong., 1st Sess. 8 (1993) 28

TABLE OF AUTHORITIES – Continued

Page

Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, The First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 7 (1994) 17

Bureau of Indian Affairs List of Federally Recognized Tribes, March 13, 2000, 65 FED. REG. 13298-13303 5

FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (R. Strickland et al., eds., 1982) 9, 17

FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942 & photo. reprint 1986) 9

Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,084, 63 FED. REG. 27,655 (1998) 16

ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 15 (2d ed. 1961) 16

Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations, 61 FED. REG. 29,424 (1996) 27

Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990) 26

Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999) 23

Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction of Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975) 25

TABLE OF AUTHORITIES – Continued

Page

L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996) 12

Government-to-Government Relations with Native American Tribal Governments: Memorandum for Heads of Executive Departments and Agencies, 59 FED. REG. 22,951 (1994) 16

WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 104-25 (1966) 17

KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 41-340 (1941) 16

Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992) 26

Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1 (1997) 18

Oklahoma Indian Times, January, 2001 30

OKLAHOMA TRIBAL COURT REPORTS (Dennis W. Arrow, Ed.) 17

Revised Executive Order on Consultation with Indian Tribal Governments, Exec. Order No. 13,175, 65 FED. REG. 67,249-67,252 (Nov. 6, 2000) 16

RENNARD STRICKLAND, FIRE AND THE SPIRITS 21-33 (1975) 16, 17

RENNARD STRICKLAND, THE INDIANS IN OKLAHOMA (1980) 17

U.S. COMM'N ON CIVIL RIGHTS, *The Indian Civil Rights Act* 29-31 (1991) 17

BRIEF FOR THE THLOPTHLOCCO TRIBAL TOWN & THE SAC AND FOX NATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS, FALLON PAIUTE-SHOSHONETRIBES and JOSEPH N. WALLRAVEN, HON.

The Thlopthlocco Tribal Town and the Sac & Fox Nation respectfully submit this Brief Amici Curiae, with the consent of all parties, pursuant to Sup. Ct. R. 37.3.[1]

INTERESTS OF AMICI SUPPORTING THE FALLON PAIUTE-SHOSHONE TRIBES, AND JOSEPH N. WALLRAVEN, HON.

Amici, two federally recognized Indian tribes within the State of Oklahoma, urge the Court to: (i) uphold tribal sovereignty as applied to the facts of this case; (ii) uphold the presumption of tribal court jurisdiction over civil disputes arising in Indian country in the first instance; and (iii) defer to the power of Congress to allocate tribal governmental authority in the American governmental system. The position urged by Respondents provides coherence and predictability in federal Indian law, implements the Constitution's plan that Congress control the relationships between tribes, states and the federal government, – including Congress' recognition of the inherent tribal civil-adjudicatory powers over non-members acting in Indian country.

Amici have strong interests in protecting the inherent powers of Indian tribes to develop and enforce tribal law and to determine facts and their jurisdictional authority initially in civil disputes in Indian country. The possibility that individual state officials would be able to come

---

[1] Pursuant to Sup. Ct. R. 37.6 counsel for Amici state that no counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. Letters of consent of the parties are filed herewith.

upon Indian country, disregard tribal law and the orders of tribal courts, ignore the federal statutory and constitutional norms protecting individuals from unreasonable searches and seizures, and escape civil accountability in the tribe's courts, offends fundamental notions of fairness, tribal sovereignty, and the right of tribes to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

The Petitioners acted on the reservation and on trust land. Pet. App. A3, B2, F1, G1, H1-H2, I2-I3.[2] This case differs from *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (action arising on state highway right of way to which tribe ceded jurisdiction) and *Montana v. United States*, 450 U.S. 544 (1981) (action involving non-Indian fee land). Even if Mr. Hicks' home was on alienated fee land (which it is not) the individuals' alleged actions threaten the tribe's political integrity and welfare. The individuals, acting pursuant to tribal court's authorization and with tribal police assistance, allegedly exceeded the terms of specific search warrant permissions. Pet. App. G1; Jt. App. 10. Although the individuals characterize Mr. Hicks' claims as "novel," Petitioners Br. 18, it is clear individual tribal members have reasonable expectations "to be secure in their persons, houses, papers, and effects against unreasonable search and seizures" under federal and tribal law. Indian Civil Rights Act, 25 U.S.C. 1302(2) ("ICRA"); U.S. Const., Fifth and Fourteenth Amendments.[3] This Court has held that the majority of such

---

[2] The Petitioners are Nevada state game wardens who Mr. Hicks, a tribal member (Pet. App. A-3, B-2, H-1) alleges acted outside the authority granted them either by the state or by the tribe. Pet. App. A4, H2-H8, I2-I4. *See Ex Parte Young*, 209 U.S. 123, 159-160 (1908). Petitioners are hereinafter referred to as the "individuals." Petitioner Mr. Molini does not appear from the record to have acted personally within Indian country.

[3] Mr. Hicks seeks relief for civil rights violations pursuant to the ICRA, federal and tribal law. Jt. App. 13-19. Fundamental

federal ICRA claims are enforceable only in tribal court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-72 (1978) (United States courts only hold jurisdiction to hear habeas corpus relief claims under ICRA; "[T]ribal forums are available to vindicate rights created by the ICRA. . . ," *Id.* at 65). Indian tribes have reasonable and legitimate expectations to govern their Indian country. The tribal court should exercise supervisory power over the search warrants and should have jurisdiction initially to consider the individuals' affirmative defenses such as qualified immunity.

SUMMARY OF ARGUMENT

Indian tribes retain inherent powers to adjudicate civil disputes arising in "Indian country" whether the parties are members or non-members, or are Indian or non-Indian. These powers predate the Constitution.

---

tribal constitutional rights, the same or similar to the federal Bill of Rights, are found in many tribal constitutions. *See, e.g.*, the CONSTITUTION OF THE SAC AND FOX NATION, Art. X, Sec. 2 provides that the Nation shall not

> Violate the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

See also THE CONSTITUTION OF THE KAW NATION, Art. VI, Sec. 2, another federally recognized Indian tribe in Oklahoma (same); and THE CONSTITUTION AND BYLAWS OF THE THLOPTHLOCCO TRIBAL TOWN, Art. I, Sec. 2 adopting the laws of the United States, so that Thlopthlocco citizens are

> secure and obtain the benefits, rights and privileges, and powers provided for by any laws of the United States now existing or that may hereafter be enacted for the benefit of Indians or other citizens of the United States. . . .

Under the "Indian Commerce Clause," U.S. CONST. ART. I, § 8, cl. 3, Congress alone has the power to determine or alter the scope of inherent tribal civil-adjudicatory powers. Congress has consistently demonstrated that it knows how to modify tribal court powers, *how, where and when it wants to.* "This Court has consistently guarded the authority of Indian governments over their reservations . . . . If this power is to be taken away from them, it is for Congress to do it." *Williams*, 358 U.S. at 223. Congress has declined to restrict tribal court jurisdiction over non-members in Indian country, and in a number of instances has recognized explicitly tribal jurisdiction over non-members.

When members and non-members act in Indian country, tribal courts should adjudicate the civil disputes in the first instance pursuant to the well-established Exhaustion Doctrine. *See e.g., National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). As a general matter, tribal courts are best situated to hear factual evidence initially and develop a record. And as a general matter, federal courts retain federal-question jurisdiction over a tribal court's jurisdictional determinations. In this case, however, the factual record remains undeveloped and the individuals' potential qualified immunity defenses to the tribal court's subject matter jurisdiction remain unasserted. Pet. App. A12-A14, B16.

This Court has recognized tribal courts as appropriate institutions to adjudicate civil disputes in the first instance involving Indians and non-Indians. *See Williams; Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *National Farmers*, and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Congress and the Executive branch recognize the government-to-government relationship between tribes and the United States. 25 U.S.C. § 3601(1)-(5). Principles of comity and deference support tribal court jurisdiction and exhaustion of tribal court remedies.

Tribes should be free to exert their powers of self-government when the civil disputes arise on Indian country. Such disputes warrant, justify and require the exercise of the strongest of sovereign powers – to defend one's territory. Otherwise, tribes are nothing more than mere absentee landlords. This Court has long held that civil disputes involving members and non-members arising on Indian country are first subject to tribal court jurisdiction. *See, e.g., Williams; Santa Clara; National Farmers;* and *Iowa Mutual*. Since Congress – aware of the Court's holdings – has elected *not* to modify that result, Amici urge this Court to treat the Congressional will as conclusive.[4] With 556 federally recognized Indian tribes in the United States, the tribal sovereign interests recognized by treaty and statute are complex and diverse.[5] The balancing of governmental powers in our American structure, including tribal court jurisdiction over non-Indians, is a distinctly political question – a question for Congress to decide. Respect for the intergovernmental relationships between tribes and the federal government demands that, in the absence of a specific federal statute or explicit treaty provision relinquishing tribal power, the Court should preserve the inherent civil powers of tribes over Indian country. *Iowa Mutual*, 480 U.S. at 18.

---

[4] In fact, Congress has taken note of this Court's conclusion regarding the presumption of tribal court civil jurisdiction. The Conference Report accompanying the Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq.*, stated that *"civil jurisdiction on an Indian reservation 'presumptively lies in tribal court,* unless affirmatively limited by specific treaty provision or federal statute.' " H.R. Conf. Rep. No. 383, 103rd Cong., 1st Sess. 13 (1993) (quoting *Iowa Mutual*, 480 U.S. at 18) (emphasis added). Congress also legislatively rejected this Court's policy conclusions in *Duro v. Reina*, 496 U.S. 676 (1990).

[5] Bureau of Indian Affairs List of Federally Recognized Tribes, March 13, 2000, 65 FED. REG. 13298-13303. The Petitioners acknowledge "twenty-six tribes and bands in Nevada alone." Br. 23.

The Constitution's allocation of sovereign power is only relevant to the extent that tribes exert inherent, pre-Constitutional powers that remain undiminished except as abrogated by Congress. Mr. Hicks dismissed his claims against the individuals in their official capacity. Pet. App. A5, G1. Absolute immunity and Eleventh Amendment constraints are not at issue here. Federal courts can review a tribal court's qualified immunity determinations after the tribal court has determined the facts and established a record. Qualified immunity remains an affirmative defense which the individual officers first should assert in the tribal court. It is not a jurisdictional bar. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

The current rule – that tribes exert self-governmental civil powers over the conduct of non-members and over non-Indians within Indian country – promotes and advances important Congressional Indian policies, including fostering self-determination and "protecting the sovereignty of each tribal government"; *see* 25 U.S.C. § 3601(2) (1994). This principle does not violate reasonable expectations of non-Indians entering Indian country (particularly as here where the State court recognized it had no jurisdiction within Indian country and directed the individuals to seek express tribal court consent in advance). Pet. App. A10, G1. In addition, the rule does not hinder the effective administration of justice among sovereigns. To the contrary, if tribal courts know that granting search warrants to non-tribal law enforcement officers means that the tribal court will lose supervisory and adjudicatory powers over (i) its warrants, (ii) the individuals, and (iii) its Indian country jurisdiction, then tribal courts would choose to deny assistance and exclude the individual officials. Such a result would chill government-to-government relationships and hinder regional law enforcement.

This Court has recognized that tribes may "oust" non-Indians granted permission to enter the reservation if they do not comply "with the initial conditions of entry." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144

(1982). There are no sound reasons for any other ruling. Finally, the traditional case law recognizing tribal court jurisdiction over non-members acting on Indian country is neither "unworkable [n]or badly reasoned." *Cf. Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (applying those tests to questions of *stare decisis*).[6]

Tribal courts are competent to adjudicate factual questions and federal legal issues of immunity. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485 n. 7 (1999) (federal law); and *Santa Clara Pueblo*, 436 U.S. at. 65 (same).

Because Mr. Hicks has sued the individuals in their personal capacities, the State of Nevada's Eleventh Amendment immunities are not implicated. Rather, Mr. Hicks seeks to hold accountable the individuals he alleges acted in excess of their official responsibilities and in derogation of tribal, federal statutory, and constitutional laws protecting individual rights. Amici support the availability of qualified immunity defenses to all government officers – be they tribal, federal or state – when they act in their official capacities. Qualified immunity protects officers doing their jobs and promotes effective government. However, the tribal court should retain its jurisdiction over (i) warrants it issues, (ii) civil claims that arise within its Indian country, and (iii) the opportunity to adjudicate affirmative qualified immunity defenses in the first instance.

---

[6] *See generally Patterson v. McClean Credit Union*, 491 U.S. 164, 172-73 (1989) (emphasis added) ("[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, *unlike in the context of constitutional interpretation*, . . . Congress remains free to alter what we have done.") (emphasis added); *Patterson v. McClean Credit Union*, 485 U.S. 617, 621 (1988) (Blackmun, J., dissenting from order directing rehearing) ("The parties in this case have not informed us of anything that suggests Congress has reconsidered its position on this statutory matter. . . . ").

ARGUMENT AND AUTHORITIES

I. Indian tribal courts have jurisdiction over claims brought by a tribal member against non-Indians in their individual capacities when the conduct arises on the reservation, and on trust land.

A. Tribes retain inherent sovereign territorial power in civil cases unless Congress limits those tribal civil-adjudicatory powers or tribes affirmatively relinquish control over their territory.

This Court has consistently recognized the undiminished powers of Indian tribal governments over their territory in civil matters involving members, except as limited by Congress or by the tribes themselves. Indian tribes derive their sovereignty from their status as extra-constitutional, domestic-dependent nations; they hold undiminished powers, except as limited by Congress or tribes themselves. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); *United States v. U.S. Fidelity Co.*, 309 U.S. 506, 512 (1940).[7]

---

[7] In 1942, Felix Cohen articulated the place of tribal governmental powers in the American system of government:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates external powers of sovereignty of the tribe, e.g. its powers to enter into treaties with foreign nations, but does not affect the internal sovereignty of the tribe, i.e. its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the

Tribes do not rely on Congress or treaties for their powers; tribal governmental powers are inherent. *E.g.*, *United States v. Wheeler*, 435 U.S. 313, 320-30 (1978); *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896) (in finding that the Constitution did not apply to the Cherokee Nation grand jury procedure to prosecute a tribal member, the Court found tribal powers were not "Federal powers created by or springing from the Constitution," but rather "existed prior to the Constitution.") "Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity." FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 231 (R. Strickland et al., eds., 1982). Governmental powers vested in Indian tribes are "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Tribes retain the inherent power to exclude non-members. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (inherent power to tax, regulate and exclude non-Indians); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (power to exclude non-members). Certainly the power to exclude persons from tribal territory contains in it the power to regulate persons on tribal territory. The Ninth Circuit, Pet. App. A13, thoughtfully reasoned:

> Any sovereign, even a limited sovereign, must have the power to adjudicate whatever it has the power to legislate. A sovereign who must depend on the courts of another sovereign to adjudicate violations of its own rules is little more than a landowner.

Indian tribes and in their duly constituted organs of government.

FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942 & photo. reprint 1986) (footnotes omitted). Cohen's articulation of inherent tribal powers remains consistent with this Court's federal Indian law jurisprudence and with Congress' power over Indian affairs.

In modern times this Court has decided fourteen cases involving tribal civil and criminal judicial powers over non-members acting on reservations.[8] All of the cases considered the sovereign powers of tribes over "Indian country."[9] Although the cases involved different

---

[8] *See Williams v. Lee*, 358 U.S. 217 (1959); *United States v. Mazurie*, 419 U.S. 544 (1975); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); *Montana v. United States*, 450 U.S. 544 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); and *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999).

[9] Congress defined "Indian country" for federal criminal purposes in a 1948 statute codifying this Court's common law jurisprudence at 18 U.S.C. § 1151 as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian rights to which have not been extinguished, including rights-of-way running through the same.

The Court has adopted Congress' Indian country definition for civil cases as well. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177-78 n. 17 (1973); *DeCoteau v. District County Court*, 420 U.S. 425, 427-28 n. 2 (1975); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478-79 (1976); and *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). The Court has also recognized the existence of "informal reservations" as

facts and legal issues, the Court has consistently applied reasoning in each dispute in favor of inherent tribal civil-adjudicatory powers over member/non-member disputes arising in Indian country where neither has the tribe relinquished powers nor has Congress legislated.

Petitioners argue that "[A] tribe's relationship with a nonmember, even on tribal land, simply is not generally an internal matter necessary for self-government." Br. 41. They contend "[n]one of [this Court's] precedents establishes a distinction based on that factor" referring to "land status." Br. 40-41. To the contrary, this Court has long recognized a significant geographic- or territorial-component to tribal sovereignty. *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (conceptualizing tribes *not* as "private, voluntary organizations" but as "unique aggregations possessing attributes of sovereignty over both their members and their territory."); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (protection of territory is "central" to the interests of any government); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (tribal powers include "a broad measure of civil jurisdiction over activities of non-Indians on reservation lands in which tribes have a significant interest."); and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) ("there is a significant territorial component to tribal power."). The *Merrion* Court, 455 U.S. at 137, wrote that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."

This Court recently found that "tribes retain considerable control over non-member conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). The

---

being Indian country in Oklahoma where most former reservations remain heavily allotted. *Sac & Fox Nation*, 508 U.S. at 123.

Court in *Strate, id.* at 451, recognized that "tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." Indian country land status remains the most reliable and easily discernable benchmark for demarcating tribal civil-adjudicatory jurisdiction.

Indian tribes hold the inherent right to exercise civil jurisdiction over territory they control. *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, 424 U.S. 382 (1976); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 103 (1982); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). This inherent governmental power is essential to tribes' survival. Accordingly, this Court has found that tribal courts remain "appropriate forums for the *exclusive* adjudication of disputes affecting important personal and property interests of *both Indians and non-Indians.*" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (emphasis added). Accordingly, an individual's voluntary presence in Indian country, within the reservation gives rise to a presumption of tribal civil-adjudicatory jurisdiction and to implied consent to tribal governmental authority over their conduct.[10]

The Court should not deny tribal jurisdiction in this case. Unlike *Montana* (involving tribal regulation of non-member fee land within the reservation) and *Strate* (involving only non-Indian parties, the action occurred on a state public highway where tribe had ceded jurisdiction, and the Court equated the road to non-member fee land), the alleged conduct in the instant case indisputably

---

[10] With regard to reservation activities of non-Indians, civil jurisdiction "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18. One commentator notes that "[w]hat distinguishes tribal Indians from other groups is the claim of sovereignty – the right not simply to be self-governing, but to exercise dominion over land." L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 897 (1996).

took place on trust land and involved a tribal member. Even under the stringent test in *Montana*, 450 U.S. at 565-566, the conduct in this case involves "consensual relationships with the tribe or its members" and affects "the political integrity, the economic security, or the health and welfare of the tribe." *See also Strate*, 520 U.S. at 446. Like the numerous Indian tax cases this Court has decided, tribes have significant governmental interests in regulating non-members who come upon the reservation. Those tribal interests are at their greatest when non-Indian conduct occurs on trust land, within the reservation, and involves an Indian or Indian property.

In this case the individuals sought the consent of the tribal court before entering the reservation and obtained the services of tribal police to accompany them to serve the warrants on Mr. Hicks, on his property on his trust land, within the reservation. Pet. App. A3, A10, B2, H1-H2, I2-I3. Certainly the facts here implicate the tribe's "political integrity to control its lands." If Mr. Hicks' allegations are true, his "welfare" is jeopardized if the individual officers exceeded the search warrant and violated his right to be secure in his home from unreasonable searches and seizures.

This Court's opinion in *Oliphant* involved tribal *criminal* jurisdiction over a non-member, which this Court found historically lacking. This case, in contrast, involves tribal civil-adjudicatory authority. In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 854 (1985), this Court easily distinguished *Oliphant*'s criminal jurisdiction principles from civil-adjudicatory cases involving non-Indians and recognized tribes' authority to control their lands.

In *Williams v. Lee*, 358 U.S. 217, 223 (1959), the Court held that the tribal court had exclusive jurisdiction over the collection of a debt owed by Indians to a non-Indian merchant on the reservation:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation

> affairs and hence would infringe on the right of Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the *authority of Indian governments over their reservations.*

(citations omitted, emphasis added).

In recent years, the Court stood by the tribes' civil authority in Indian country in the face of competing state interests. In *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-24 (1993), the Court recognized again the right of tribes to be free from state jurisdiction in the absence of explicit Congressional authorization:

> We found a "deeply rooted" policy in our Nation's history of "leaving Indians free from state jurisdiction and control." 41 U.S., at 168 (internal quotation marks omitted). Indian nations, we noted, long have been " 'distinct political communities, having territorial boundaries, within which their authority is exclusive.' " *Ibid.* (quoting *Wocester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (Marshall, C.J.)). The Indian sovereignty doctrine, which gave state law "no role to play" within a tribe's territorial boundaries, did not provide "a definitive resolution of the issues," but it did "provid[e] a backdrop against which applicable treaties and federal statutes must be read." [*citing McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)][11]

---

[11] *Worcester* concluded that because the federal-tribal relationship is exclusive, states have no role to play in Indian country. The Court also cites *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 178-179 (1980) (Rehnquist, J. concurring in part, concurring in result in part, and dissenting in part). *See also Rice v. Olson*, 324 U.S. 786, 789 (1945).

Amici submit that prior decisions and *stare decisis* require the Court to give great deference to Congress when deciding the scope of tribal civil-adjudicatory powers over non-members in Indian country. Although tribes are domestic-dependent sovereigns in the federal-tribal relationship, the Court should tread cautiously in areas where tribes have not ceded jurisdiction or areas where Congress has not abrogated those pre-existing tribal rights. *See, e.g., Merrion*, 455 U.S. at 149, *quoting Santa Clara*, 436 U.S. at 60 ("a proper respect for both tribal sovereignty itself, and for the plenary power of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."). Congressional action is required to alter the status quo of tribal civil-adjudicatory powers, and no such action was taken in this case.

B. The Court should uphold the prudential rule of presumptive deference to tribal courts to adjudicate civil disputes arising in Indian country involving tribal members and non-members in the first instance.

The United States supports, and is "committed to a policy supporting tribal self-government and self-determination." *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 & n. 20 (1985). "[T]ribal justice systems are an essential part of tribal governments," 25 U.S.C. § 3601(5).[12] The Executive Branch has also reaffirmed

---

[12] The Indian Tribal Justice Act of 1993 further provides in full:

> The Congress finds and declares that –
>
> (1) there is a government-to-government relationship between the United States and each Indian tribe;
>
> (2) the United States has a trust responsibility to each tribal government that includes the

principles of inherent tribal sovereignty.[13]

The Petitioners claim that tribal courts are recent developments ("tak[ing] root [ ] two to three generations *after* . . . 1871") (emphasis original). Br. at 26. Contrary to such assertions, it is beyond cavil that tribal dispute resolution processes antedate the founding of the United States of America.[14] The Cherokee Nation operated its

---

protection of the sovereignty of each tribal government;

(3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;

(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;

(5) tribal justice systems are an essential part of tribal governments and serve important forums for ensuring public health and safety and the political integrity of tribal governments;

(6) Congress and the federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property interests.

[13] *See Revised Executive Order on Consultation with Indian Tribal Governments*, Exec. Order No. 13,175, 65 FED. REG. 67,249-67,252 (Nov. 6, 2000); *Consultation and Coordination with Indian Tribal Governments*, Exec. Order No. 13,084, 63 FED. REG. 27,655 (1998); *Government-to-Government Relations with Native American Tribal Governments: Memorandum for Heads of Executive Departments and Agencies*, 59 FED. REG. 22,951 (1994).

[14] *See, e.g.*, ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 15 (2d ed. 1961) (describing ancient processes of the Choctaw Nation); KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 41-340 (1941) (describing traditional and evolving dispute-resolution procedures of the Cheyenne Tribe); RENNARD STRICKLAND, FIRE AND THE SPIRITS 21-33 (1975) (describing

own courts in Indian territory (later day Oklahoma) beginning in 1867,[15] and the United States began assisting some tribes by offering Courts of Indian Offenses since the 1880s.[16] Today, many of the 556 federally recognized tribes have formal and well-developed judicial systems to adjudicate civil disputes arising in Indian country.[17] Many tribal governments employ judges and justices who are lawyers, law professors, retired state and federal judges and are both Indian and non-Indian. Most of the thirty-nine federally recognized tribes in Oklahoma have modern, efficient and well-equipped tribal court systems staffed by professional judges and court staff.[18] The United States has provided extensive assistance to

---

basic legal precepts of the Cherokee Nation as they existed in the 1700s); Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 7, 8-30 (1994) (Tribal Courts Symposium).

[15] Strickland, *id.* at 158-67 (describing operation of Cherokee courts in the Nineteenth century until their abolishment under the Curtis Act in 1898).

[16] *See, e.g.*, WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 104-25 (1966).

[17] *See* U.S. COMM'N ON CIVIL RIGHTS, *The Indian Civil Rights Act* 29-31 (1991); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 332-335 (R. Strickland, et al. eds. 1982).

[18] The Sac & Fox Nation has a professional and well-developed tribal district and appellate court structure over three decades old and staffed by law school trained judges pursuant to tribal law. The Thlopthlocco Tribal Town is developing its tribal governmental structures and plans to establish a tribal court as governmental funds become available. *See also* Arrow, *supra* at n. 13 at 44-80, describing the history and development of tribal courts; OKLAHOMA TRIBAL COURT REPORTS (Dennis W. Arrow, Ed.) Vols. 1-5 compiling many modern Oklahoma tribal court decisions from 1979 to date and RENNARD STRICKLAND, THE INDIANS IN OKLAHOMA 76-77 (1980) describing the rebirth of tribal courts in Oklahoma.

encourage the development of tribal court systems.[19] In short, tribal courts in recent decades have developed "in leaps and bounds."[20]

In *National Farmers*, 471 U.S. at 856-57, and *Iowa Mutual*, 480 U.S. at 18, this Court made it clear that in cases arising in Indian country, *federal* courts must abstain from the exercise of jurisdiction. Jurisdictional issues and the merits of the case are to be resolved in the appropriate tribal court. In *Iowa Mutual*, 480 U.S. at 19, the Court noted an important substantive limitation on federal court review: where tribal court subject matter jurisdiction exists, "proper deference to the tribal court system precludes relitigation of issues" raised and resolved in tribal courts. The Court noted the importance of tribal courts in the American system such that the "federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts." 480 U.S. at 16-17.

A requirement that litigants exhaust tribal court remedies promotes an important policy – a policy frequently invoked in administrative law cases: Specialized hearing bodies should be given the first opportunity to apply their informed judgment to a particular issue.[21] Tribal court judges have specialized expertise and experience in adjudicating matters involving tribal laws and custom, as well as federal laws and regulations that extensively regulate everyday life in Indian country.

---

[19] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 & n. 21 (1978); *see also* Indian Tribal Justice Technical and Legal Assistance Act of 2000, §§ 2, 101, 106, 201, 202, Pub. L. No. 106-559, 114 Stat. 2778 (finding presumptive civil jurisdiction for tribal courts unless affirmatively limited by statute or treaty and authorizing appropriations for tribal justice systems).

[20] Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 2 (1997).

[21] *National Farmers*, 471 U.S. at 856; *cf. Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

In *Iowa Mutual*, the Court stated:

> In diversity cases, as well as *federal-question cases*, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. *Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority*, because tribal courts are best qualified to interpret and apply tribal law.

480 U.S. at 16 (emphasis added) (citations omitted).

Further, under the Exhaustion Doctrine, tribal courts have the opportunity to make *nisi prius* determinations of the limits of their own authority. This prudential rule of abstention avoids concurrent litigation in tribal and federal courts and promotes judicial economy. Contrary to the States Attorney Generals' Amici Brief in support of Petitioner (Br. p. 8), tribal court decisions are reviewable before tribal appellate Courts, *Iowa Mutual*, 480 U.S. at 16-18, and the tribal court's determination of its jurisdiction is reviewable in federal court. A tribal court is best situated to apply its own laws, to take evidence, to determine facts from witnesses readily available on the reservation.

In *National Farmers*, 471 U.S. at 856-57 (footnotes omitted), this Court explained the policy reasons for the abstention doctrine:

> We believe that examination should be conducted in the first instance in the tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either

> the merits or any question concerning appropriate relief is addressed . . . Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

In summary, tribal courts deserve the respect and deference appropriate to the courts of sovereign entities: tribal courts should be given an opportunity to decide the extent of their jurisdiction as an initial matter.

The Petitioners can point to no treaty where the Fallon Paiute-Shoshone Tribe has relinquished civil-adjudicatory power or where Congress has divested tribes of such inherent powers. Accordingly, this tribe and its tribal court's inherent civil-adjudicatory powers remain intact. To the contrary, Congress provided all states including Nevada, with the only whole-scale opportunity to assume civil jurisdiction over Indian country located within their borders pursuant to P.L. 83-280.[22] Although Nevada initially assumed jurisdiction over much Indian country in its state, Nevada later retroceded all civil and criminal jurisdiction over Indian country in 1975 and in 1988. 25 U.S.C. § 1323 (1983 and 2000 Supp.); 40 FED. REG. 27,501 (1975); 53 FED. REG. 5837 (1988); Nev. Rev. Stat. § 41.430 (1999). No other Indian tribe in Nevada, including the Fallon Paiute-Shoshone Tribe, has since consented to Nevada state jurisdiction. As will be demonstrated below, where Congress has not spoken explicitly, and the tribe has not specifically given up powers in a bargained-for exchange, tribal civil-adjudicatory powers remain intact.

---

[22] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588. Later, Congress added a tribal consent requirement before states could assume jurisdiction. Pub. L. No. 90-284, Title IV, 82 Stat. 73 (1968) (codified in relevant part at 25 U.S.C. §§ 1321(a), 1322(a) (1983 and 2000 Supp.).

Iowa Mutual, and more recently, *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999) have settled the issue that tribal courts are competent to adjudicate federal law issues. Tribes adjudicate federal claims on a regular basis. Tribal courts can and do adopt federal statutory and common law on a daily basis to resolve disputes. The Cherokee Nation, for example, has adopted the Federal Rules of Civil Procedure and the Federal Rules of Evidence unless superceded by a Cherokee Nation rule for its judicial system. 12 C.N.C.A. § 1 (1993).

For the "exhaustion requirement" to have any real meaning tribal courts should have initial civil-adjudicatory jurisdiction over their territory, even for federal civil rights claims. Such jurisdiction over non-Indians engenders the very legitimacy of tribal courts and their survival as tribal governmental institutions. If a tribal court cannot even maintain supervisory jurisdiction over a search warrant it approved, then a tribal court's powers are illusory. A government that loses the power to regulate civil matters loses its identity. Non-Indian interests are at a minimum when the non-Indian (i) is on the reservation, (ii) is on trust land, (iii) enters into a consensual relationship with the tribe, (iv) acts pursuant to an explicit and limited permission granted by a tribal court, and (v) uses tribal governmental services.

C. The Court should defer to Congress' plenary power to alter current allocations of tribal adjudicatory authority.

The Constitution mentions tribes three times[23] but does not clearly delineate the relationships between tribes, the United States and the states. However, this

---

[23] Congress may regulate commerce "with the Indian Tribes," U.S. CONST. Art. I, § 8, cl. 3 and "Indians not taxed" are not counted when appropriating House of Representatives, U.S. CONST. § 2, cl. 3; U.S. CONST. Amend. XIV, § 2.

Court has repeatedly recognized that the "Indian commerce clause" grants Congress plenary authority to control the relationship between Indians and the United States. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *see, e.g., United States v. Kagama*, 118 U.S. 375, 380 (1886) (holding that Congress may criminalize even purely intratribal misconduct on the reservation); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (Congress had "Plenary authority over the tribal relations with the Indians . . . a political [authority], not subject to be controlled by the judicial department of the government."); *United States v. Sandoval*, 231 U.S. 28, 34 (1913) (holding Congress' power extends even to Indians who are citizens and who hold property in fee simple). *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). "If this power is to be taken away from them, it is for Congress to do it." *Williams*, 358 U.S. at 223.

This Court from time to time has offered the reminder that generalizations are "particularly treacherous" in the field of Indian law. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1980). Given the complex character of the relationship of tribes to the broader American system of government and the difficulty of balancing competing interests of non-members, curtailing the inherent civil-adjudicatory powers of tribal governments over Indian country is a political decision best left to Congress. This Court should not intrude upon a legislative function by altering express tribal civil-adjudicatory powers without Congressional guidance.[24]

---

[24] *Santa Clara Pueblo*, 436 U.S. at 58; *cf. United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 354 (1941) (applying Indian law "canons of construction," pursuant to which ambiguous expressions in federal statutes will not be construed in a manner constrictive of tribal rights); *Bryan v. Itasia Co.*, 426 U.S. 373, 392 (1976) (Congressional intent to deprive Indians of their rights will not be implied); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship

The Court should not find a statutory abrogation of tribal civil-adjudicatory powers unless Congress has expressed a clear intent to do so. The special Indian law canons of construction reflect the unique sovereign-to-sovereign relationship and the special trust relationship between the United States and tribes. 25 U.S.C. § 3601 (1)-(2).

This Court has historically recognized Congress to be the exclusive authority to define, fulfill, and apply the federal trust responsibility to Indian tribes:

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.

Morton v. Mancari, 417 U.S. 535, 551-552 (1974).[25]

---

between the United States and the Indians."); and *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751 (1998) (this Court refused to abolish tribes' inherent immunity to unconsented suits where Congress has not legislated blanket tribal immunity; the Court left the issue for Congress). *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: the Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 85 (1999) (concluding that evaluating the adequacy of protecting non-Indians from tribal authority in Indian country is a policy choice best left to Congress because the considerations are "inherently political and not easily subject to judicial balancing and resolution.").

[25] Congress is the primary obligor and interpreter of the trust responsibility towards Indian tribes. *See, e.g., United States v. Mitchell*, 445 U.S. 535, 540-46 (1980). This Court has historically deferred to Congressional actions (and inactions) in that field. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 56-72 (declining to diminish tribal sovereign immunity to an extent greater than Congress had done in the Indian Civil Rights Act of 1968). This Court held in *Mancari*, 417 U.S. at 455:

> [A]s long as the special treatment can be rationally tied to the fulfillment of Congress' unique obligation

The Court has found in the context of tribal sovereign immunity that modern Congressional reaffirmations

> . . . reflect Congress' desire to promote the good of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 510 (1991) (internal quotation marks and citation omitted); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Congress has not disturbed federal case law regarding tribal civil-adjudicatory powers over non-members and non-Indians. This Congressional silence suggests that Congress is satisfied with the status quo. Amici respectfully submit that policy choices regarding the jurisdiction of tribal courts are best left to Congress.

Long ago this Court also recognized that non-Indians who enter Indian country must take tribal law as they find it. *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823).

> toward the Indians, such legislative judgments will not be disturbed.

To diminish tribal court civil-adjudicatory powers over non-Indians acting within Indian country would undermine the contemporary Congressional policies promoting tribal self-determination, economic self-sufficiency and intrude in areas where Congress enjoys plenary power.

Contrary to the States Att. Gen. Amici Brief suggesting the Court should adopt Congress' intent behind the Allotment Act over a century ago to end tribal land ownership and substitute private ownership to facilitate the assimilation of tribes, Br. at 2, Congress abandoned this policy over a half century ago with the passage of the Indian Reorganization Act, 25 U.S.C. § 476 *et seq.* The current Congressional policy promotes tribal self-determination and support for tribal governments, including tribal courts. 25 U.S.C. § 3601(1)-(6).

Only a federal statute or treaty can extinguish the aboriginal jurisdiction of tribal courts. For over a century, Congress has shown that it can modify tribal court jurisdiction when it wants to. Over a century ago this Court recognized the lack of authority of federal or state courts to act in the absence of an Act of Congress. *Ex Parte Crow Dog*, 109 U.S. 556 (1883) (acknowledging inherent power of tribe to exclusively prosecute murder committed by tribal member). Congress reacted by extending federal court concurrent jurisdiction over enumerated "major crimes" committed by Indians in Indian country.[26] The Major Crimes Act, 18 U.S.C. Sec. 1153 (1988) vests United States with concurrent jurisdiction (with tribes) to prosecute enumerated major crimes committed by Indians on Indian country. Tribes still retain concurrent jurisdiction for major crimes. *Talton v. Mayes*, 163 U.S. 376 (1896) (murder).

With Public Law 83-280 Congress granted mandatory criminal and civil-adjudicatory jurisdiction over Indian country events to five states and authorized other states to assume jurisdiction at their pleasure. Congress later amended the statute in 1968 to require tribal consent before states could assume jurisdiction.[27] Congress spoke specifically with other statutes: The Indian Child Welfare

---

[26] Act of Mar. 3, 1885, ch. 341, Sec. 9, 23 Stat. 388 (current version as amended at 18 U.S.C. § 1153 (1988)). The Court upheld Congress' exercise of plenary power over inherent tribal sovereign powers in *United States v. Kagama*, 118 U.S. 375 (1886).

[27] "Without question," the Court wrote in *Washington v. Confederated Yakima Tribes*, 439 U.S. 463, 488 (1979), PL-280 reflects "the general assimilationist policy followed by Congress from the early 1950's through the late 1960's." Congress has clearly abandoned these termination policies in favor of tribal self-government and respecting inherent tribal governmental powers and supporting institutions. 25 U.S.C. § 3601(1)-(6). *See, e.g.*, Carole E. Goldberg, *Public Law 280: the Limits of State Jurisdiction of Reservation Indians*, 22 U.C.L.A. L. Rev. 535 (1975).

Act of 1978, 25 U.S.C. § 1911(a) (affirming tribal courts as holding exclusive jurisdiction to resolve disputes under that federal law); the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.*; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (interpreting ICRA to provide for exclusive tribal court jurisdiction over enumerated fundamental rights similar to the Bill of Rights except that habeas corpus relief is restricted to federal courts) and in 1990 amendments to 25 U.S.C. § 1301(2) providing for the definition of "powers of self-government" to mean "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians.*"[28] (emphasis added). Since Congress can act when it wants to, Congressional *inaction* is significant. It would indeed be strange for the Court's policy making in Indian affairs to run counter to the current express will of Congress on these issues.

Regarding the Indian Civil Rights Act ("ICRA"), Congress appears to have assumed tribal courts would exercise civil jurisdiction over non-Indians. The ICRA affords "any person" many of the civil rights protections found in the Bill of Rights. 25 U.S.C. § 1302 (1994). When introduced in Congress, the Bill provided that the civil rights would extend to *"American Indians."* A later amendment changed the language to *"any person."*[29]

---

[28] In response to *Duro v. Reina*, 495 U.S. 191 (1990), Congress specifically affirmed tribal court powers over all Indians, not just members of a particular tribe, for one year. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892. Congress affirmed the inherent tribal criminal jurisdiction powers over non-members permanently in 1991. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646. *See* Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992).

[29] Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1162-63 (1990).

This Court frequently holds that Congress is presumed to legislate with knowledge of caselaw treating an issue. *See, e.g., Fogarty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In light of extensive review of federal statues, and in light of the Congressional actions specifically addressing tribal courts,[30] there can be no doubt that Congress knows of the tribal civil-adjudication case law involving non-members and non-Indians generally.[31] Congress continues to

---

[30] *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, 450a (providing funding and assistance for tribal government institutions, including tribal courts); Indian Reorganization Act, 25 U.S.C. § 476 *et seq.* (providing for reorganization of tribal governments); Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.* (recognizing tribal self-government, establishing tribal courts, establishing for development of model code of Indian offenses for tribal courts); Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq.* (establishing the Office of Tribal Justice Support within the Bureau of Indian Affairs and authorizing appropriations for assisting tribal courts) and Department of Justice policy supporting development of tribal justice systems, *Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations*, 61 FED. REG. 29,424 (1996).

[31] *See Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n. 15 (1985):

> . . . where . . . Congress adopts a new law incorporating sections of a prior law, Congress can normally be presumed to have knowledge of the interpretation given to incorporated law, at least in so far as it affects the new statutes.

Amici respectfully submit that the same result should obtain when the "incorporated law" is federal common law rather than a statute. *Cf. National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850 (1985):

recognize tribal justice systems as "important forums for ensuring public health and safety and the political integrity of tribal governments" and are "the appropriate forums for the adjudication of disputes affecting personal and property rights." *Id.*[32]

The Court should tread lightly in altering the civil-adjudicatory powers of tribal courts. Congress is the appropriate branch to allocate tribal court civil powers and to address the tensions between tribes and non-members in Indian country. Because such considerations are inherently political and not easily resolved by judicial balancing, this Court should defer to Congress' plenary power to expand or restrict inherent tribal civil-adjudicatory jurisdiction.

II. This dispute does not implicate Eleventh Amendment considerations.

The individuals obtained explicit permission from the tribal court to search Mr. Hicks' home. In granting the warrant, the tribal court did not relinquish jurisdiction; it carefully crafted a narrow directive in the first warrant. Significantly, the tribal court retained supervisory jurisdiction. The individuals had no power in Indian country except that power specifically granted by the tribal court. The tribal court should be allowed to supervise the execution of the warrant and to adjudicate Mr. Hicks' claims.

> Federal common law articulated in rules that are fashioned by court decisions are 'laws' as that term is used in (28 U.S.C. § 1331).

(citing *inter alia County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235-36 (1985)).

[32] Congressional intent reflected in the report accompanying the Indian Tribal Justice Act found that "tribal courts are permanent institutions charged with resolving the rights and interests of *both Indian and non-Indian individuals.*" S. Rep. No. 88, 103rd Cong., 1st Sess. 8 (1993) (emphasis added).

The individuals are sued only in their individual capacities. Pet. App. A5, A13, A23 n. 13. The State of Nevada's immunity under the Eleventh Amendment is not implicated. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (distinguishing individual and official capacity suits). Mr. Hicks dismissed his claims against the State five years ago. There is a presumption that public officials are entitled to qualified, rather than absolute immunity. *Burns v. Reed*, 500 U.S. 478, 484-92 (1991). Assuming arguendo that Mr. Hicks' allegations are true, it is not within the scope of the individuals' duties to violate the Bill of Rights, the ICRA and tribal common law prohibitions against unreasonable search and seizures. Violating the Bill of Rights or similar laws is not within the actions normally taken in the course of discharging official responsibilities, especially by a state officer on the reservation, in Indian country under an explicit directive from the tribal court.

The individuals' duties *do not* include enforcing state laws in Indian country on the tribe's reservation. The State of Nevada has no reason to exercise "sovereign responsibilities within the Reservation." (*See* States Att. Gen. Amici Brief at 28). Nevada's arguments regarding state sovereignty are unavailing. Mr. Hicks alleges the individuals exceeded the scope of the warrant or acted under invalid warrants. The tribal court is not exercising powers over the State of Nevada, only the individuals that allegedly violated the express terms of the tribal warrant.

The result of adopting the Petitioners' view here, would be that a state court would have no jurisdiction to try a civil action against an individual tribal officer who served a warrant outside the tribe's Indian country and within that state, when the allegations were that the tribal officer had violated or exceeded the express limitations imposed by the state court when it approved the warrant.

That is simply not good law or policy.[33] Neither is the position adopted herein by the Petitioners.

The State of Nevada complains that the tribe has turned *Williams v. Lee* from a shield into a sword. Br. 19. It is the individual officers who came onto the reservation, who came onto trust land and who allegedly exceeded specific permissions provided by the tribal court. Mr. Hicks seeks relief in tribal court as a shield to protect his civil rights. The tribal court should decide the as-yet unasserted qualified immunity defenses in the first instance.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

D. Michael McBride III*
Counsel for the Thlopthlocco Tribal Town & Attorney General and General Counsel for the Sac and Fox Nation
Steven K. Balman
Sneed Lang, P.C.
**Counsel of Record*

January 2001

---

[33] Non-Indian state and local government requests for assistance from tribal law enforcement agencies are not unusual. *See* "Cherokee Nation Marshals Make Meth Arrest", *Oklahoma Indian Times*, January, 2001, at p. 4-5 (detailing Grove, Oklahoma municipal Police Chief Miller's request for tribal police assistance because the Cherokee Marshals had special expertise in methamphetamine drug interdiction methods). Effective regional government for Indians and non-Indians alike depends on comity and cooperative government-to-government relationships.

JAN 19 2001 (8)

No. 99-1994

Supreme Court, U.S.
FILED
JAN 19 2001
CLERK

IN THE

Supreme Court of the United States

NEVADA, ET AL,
Petitioner,
v.

HICKS, FLOYD, ET AL
Respondents

On Writ of Certiorari to the Ninth Circuit Court of Appeals

BRIEF OF COALITION FOR LOCAL SOVEREIGNTY SUPPORTING THE RESPONDENT

Kenneth B. Clark, *Counsel of Record*
COALITION FOR LOCAL SOVEREIGNTY
611 Pennsylvania Ave, SE - # 169
Washington, DC 20003
(301) 579-6100

BEST AVAILABLE COPY

8 pp

Question Presented

Does the U.S. Constitution permit the federal courts to shield a defendant from civil trial in the vicinage of an alleged offense, by invoking immunity for government agents?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Federal courts may not shield a defendant from trial in the vicinage of the alleged offense, by invoking immunity for government agents. 2

A. Art 3 of the US Constitution requires that trial by jury be interpreted not just as an individual right, but as a right of local communities to participate in the determination of offenses committed within those communities. 2

B. Adjudication of civil offenses by local courts is necessary for the preservation of local self-government. 6

C. The claim of immunity for agents of the state violates the right of the community to participate in adjudication of local offenses. 11

D. Sovereign Immunity does not shield individual agents from suit 13

Conclusion 15

TABLE OF AUTHORITIES

	page
Constitutional Provisions	
U.S. Constitution, Art 3 Sect. 2, cl 3	5-7
U.S. Constitution, Amend. 6	6-8, 12
U.S. Constitution, Amend. 7	7, 8, 12
Cases	
Antoni v. Greenhow, 107 U.S. 769	14
Brecheen v. Oklahoma, 485 U.S. 909	9
Callan v. Wilson, 127 U.S. 540	7, 12
Cunningham v. Railroad Co., 109 U.S. 446	14
Duro v. Reina, 495 US 676	10
Ex Parte Young, 209 U.S. 123	13, 14
Hagood v. Southern, 117 U.S. 52	14
In re Ayers, 123 U.S. 443	14
Lee v. Georgia, 488 U.S. 879	9
Patton v US, 281 U.S. 276	5,6
Pennoyer v. McConnaughy, 140 U.S. 1	14
State v. Jumel, 107 U.S. 711	14
Strate v. A1 Contracting 520 US 438	11
Swindler v. Lockhart, 495 U.S. 911	9
US v. Mazurie, 419 U.S. 544	11
Williams v Florida 399 U.S. 78	7, 8
Williams v. Lee 358 US 217	9
Statutory Provisions	
Judiciary Act of 1789	7

Miscellaneous Authorities

Declaration of Independence 4

Declarations of First Cont. Congress 4

Federalist 83, Alexander Hamilton 7

Constitutional Scholarship

Amar, Akhil Reed. A Tale of Two Cities. Findlaw Commentary 1999. 3, 4, 14

Glendon, Mary Anne. *Rights Talk*. New York: Free press 1991. 14

INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state, local and tribal officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner, and counsels to the respondents, have consented to the filing of this *amicus* brief. Consent letters are on file with the Clerk of the Court.

SUMMARY

At root this case is about the ability of tribal governments to adjudicate disputes arising from actions occurring within a tribe's territorial jurisdiction.

This Court has ruled that the purpose of trial by jury is both "in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, *and* in the community participation and shared responsibility that results from that group's determination of guilt or innocence" *(Williams v Florida* (1970)). This understanding is basic in the common law understanding that a jury of the vicinage is the proper authority for adjudicating alleged offenses (whether civil or criminal) committed in the community.

The attempt by the State of Nevada, to use the federal courts to block the civil trial of individual state agents in tribal court, runs afoul of constitutional design and the common law. Nevada, in effect, asks this Court to adopt the ill advised 1774 "Intolerable Acts" as the law of the land, and make individual state agents unaccountable to local courts for acts they commit while within the tribe's jurisdiction, even while actually performing functions at the suffrage of the tribal government.

---

[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

This Court has also repeatedly ruled that to deny civil trial jurisdiction to tribal courts, even in disputes between Indians and non-Indians "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves"(Williams v. Lee (1959)).

ARGUMENT

I. Federal courts may not shield a defendant from trial in the vicinage of the alleged offense, by invoking immunity for government agents.

A. Art 3 of the US Constitution requires that trial by jury be interpreted not just as an individual right, but as a right of local communities to participate in the determination of offenses committed within those communities.

This Court has ruled repeatedly that the Article 3 requirement that 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed" guarantees a right of the community to participate in the judgement of crimes.

The issues raised in this case take us back to fundamental common law rights which the American Founders fought to protect.

The claim that government officials might be held immune from prosecution by the local community was a major cause of the American Revolution, and the principle of government officials being responsible to the neighborhood, or vicinage[2], is a

---

[2] "Vicinage" means neighborhood, and "vicinage of the jury" means jury of the neighborhood or, in medieval England, jury of the County. 4 W. Blackstone, Commentaries on the Laws of England *350-351 (T. Cooley 4th ed. 1899). See 3 J. Story, Commentaries on the Constitution of the United States 1775-85 (1833).

fundamental principle enshrined in the Declaration of Independence and the US Constitution.

In the winter of 1770, a group of British solders fired upon a crowd of Bostonians, in the incident which has ever since been know as the Boston Massacre. On March 13, the colony's attorney general issued 13 indictments for murder. The British soldiers were tried before the Superior Court of Judicature, the highest court in Massachusetts. The Justices of the court served at the pleasure of the Massachusetts legislature. The jurors were local colonists.

The British soldiers were acquitted of the worst charges, but the trial caused Parliament to pass two important measures: the Administration of Justice Act and the Massachusetts Government Act. The Administration of Justice Act declared that henceforth any English soldier charged with a crime could not be tried in the colonies but would return to Britain. The Massachusetts Government act vested all authority in the royal governor to appoint court officials, juries and sheriffs. These acts, revoking parts of charter of 1691, stripping away the power of the colonists to control the courts, and revoking all jurisdiction over British officials became known as the Intolerable Acts.

These acts caused tremendous resentment, and were a major contribution to the War. More importantly, however, were the legal principles involved, upon which the United States was founded. The Colonists not only believed that these acts destroyed self-government and placed British officials "above the law," but that the Administration of Justice Act was a flagrant violation of the common law principle of "vincinage."

As the distinguished Yale Constitutional scholar Akhil Reed Amar has described it, the common law required:

> a jury of the 'vicinage': one composed of citizens of the locality where the blood had spilled. The vicinage rule derived from the local community's right to self-government, a right to judge for itself, via the jury, what had happened and how to respond. . . . The basic idea of

jury trial in cases like the Boston Massacre, the Rodney King beating, and the Diallo killing is that the people directly affected by government officers should be the ones who judge them.

The First Continental Congress, called largely in response to the Intolerable Acts passed a resolution saying, "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law" (1 Journals of the Continental Congress, 69).

These principles of self-government and the rule that officials must be *responsible to the community in which their actions are committed* were enshrined in both the Declaration of Independence and the U.S. Constitution.

The Declaration declared in its Bill of Particulars against the King:

> He has obstructed the Administration of Justice [a clear reference to the Administration of Justice Act], by refusing his assent to laws for establishing the Judiciary powers,
> – he has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries . . .
> – he has affected to make the military independent of and superior to the civil power,
> – he has combined with others to subject us to a jurisdiction to a foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation:
> – For quartering large bodies of armed troops among us:
> – For protecting them by a mock trial, from punishments for any murders they commit on the inhabitants of these States.

We certainly do not regard the actions of British soldiers and the Nevada officials in the current case as being in any way comparable by way of gravity, but we do believe that the principle at issue is the same. The principle is that outside officials who

come into a community and commit illegal acts attacking the lives, liberties or property of local citizens ought not, and may not legally, be shielded from the laws of that community.

In addition to the authority of the Declaration, however, more important is the fact that these concerns for the common law principle of the "jury of the vicinage" was incorporated in both Article 3 and the Sixth Amendment (and by implication the Seventh Amendment) of the U.S. Constitution. Article 3 declared that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed."

The wording here is very important. Article 3 does not say that a defendant has a "right to trial by jury," rather it declares that trial of all crimes "shall be by jury." This Court has noted repeatedly that this wording makes trial by jury more than simply a "right of the defendant" and the defendant may not unilaterally "waive" trial by jury. This Court ruled (Low v. United States (C. C. A.) 169 F. 86, 92; and Dickinson v. United States (C. C. A.) 159 F. 801. Patton v US (1930) 281 U.S. 276) that

> Undoubtedly, the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment or conviction for crime, when there has been a plea of not guilty, rests upon the foundation of a verdict by a jury. Without that basis the judgment is void.

Thus court has said clearly, and repeatedly that the Article 3 requirement that "trial shall be by jury" concerns rights of both the defendant "and the public."

Yet, many people in the early days, believed that Article 3 did not go far enough to ensure truly local jurisdiction. The desire to guarantee that crimes should be tried not just in the state but in

the vicinage, resulted in the more local language included in the Sixth Amendment that all crimes should be tried in both the "state and the district where they shall have been committed."

There can be no doubt that the words of the Sixth Amendment were not intended to diminish the jury as a means of self-government, but was simply intended to ensure that juries were drawn from the local neighborhood rather than from across the state. The Federal Farmer (either Richard Henry Lee or Melancton Smith), opens letter 2, for example, by stating that "The essential parts of a free government are a full and equal representation of the people in the legislature and the jury trial of the vicinage in the administration of justice." Many early American regarded the jury as on a par with representation in the legislature. The legislature was the representatives of the people making law, while the jury was the representatives of the people seeing that those laws were properly administered. (It is also important to note that here as elsewhere, proponents of what were to become the Sixth and Seventh Amendments made no distinction between civil and criminal trials with regard to the jury as a means of local self-government.)

It should be noted that while the Sixth Amendment does express this vicinage requirement as a privilege of the defendant this Court has repeatedly noted that this slightly different emphasis from Art 3 should be taken to deny the right of the community to participate via the jury. Notably in Patton v. US this court said:

> This provision, which deals with trial by jury clearly in terms of privilege, although occurring later than that in respect of jury trials contained in the original Constitution, is not to be regarded as modifying or altering the earlier provision [requiring trial by jury in all criminal cases]; and there is no reason for thinking such was within its purpose. The first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing;

and this is the effect of the holding of this court in Callan v. Wilson, 127 U.S. 540, 549 , 8 S. Ct. 1301, 1303, where it is said:

> 'And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them.'

Rather than lessening the "rights of the community" Amendment 6 was adopted simply to ensure a more local jurisdiction than simply each state as a whole.

> Indeed, pending and after the adoption of the Constitution, fears were expressed that Article III's provision failed to preserve the common-law right to be tried by a "jury of the vicinage." That concern, as well as the concern to preserve the right to jury in civil as well as criminal cases, furnished part of the impetus for introducing amendments to the Constitution that ultimately resulted in the jury trial provisions of the Sixth and Seventh Amendments. *Williams v Florida* ([399 U.S. 78, 94] 1970)

When viewed in its proper historical context, the Sixth and Seventh Amendment (like Article 3) contains not just a right of individuals to be tried locally but also the right of communities to be the judge of offenses (real or imagined) committed therein.

This principle of community responsibility was enshrined in the Judiciary act of 1789, which required in section 29: "That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence."

The requirement that a jury must be selected from the vicinage, even when a trial could not be physically held in the county where an alleged crime was committed, clearly shows the first Congress's concern that determinations of crimes ought to be by representatives of the community against which the crime is

committed.

The early disputes over trial by jury clearly regarded jury trial in civil matters as basic to preserving liberty. As Alexander Hamilton noted in Federalist 83, "The objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases." Hamilton went on to note that "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."

Hamilton makes clear in Federalist 83 that while he regards trial by jury in criminal cases as far more important than in civil cases, his opponents regard them as equally necessary. The anti-federalists and federalist supporters of a Bill of Rights regarded trial by jury in civil cases as essential to the preservation of freedom and local self-government (see, for example, Federal Farmer letters 2 and 15). While the authority of Hamilton is assuredly great, on the matter of the Sixth and Seventh Amendments the views of its supporters who saw them as a buttress to "popular sovereignty" and who regarded jury trial in both criminal and civil cases as "the very palladium of free government"must take precedence.

Finally, as recently as 1970 this Court has explicitly acknowledged "community participation" is fundamental in the very purpose of a jury. In *Williams v. Florida* (399 U.S. 78) this Court declared "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, ***and*** *in the community participation and shared responsibility that results from that group's determination of guilt or innocence*" [emphasis added]. The purpose of the jury is not just to preserve individual rights but to ensure "community participation and shared responsibility."

While some jurisprudence in recent years has tended to

assume that "a defendant's interest in a fundamentally fair trial outweighs the State's interest in holding that trial in a particular district." (J. Marshall dissent, Brecheen v. Oklahoma, 485 U.S. 909, 911 (1988)), never has this court denied that communities do possess an interest in holding trials in the local community, and even dissenters such as Justice Marshall have acknowledged that interest. In fact, in recent years this Court has repeatedly declined to expand the right to change of venue by a defendant in the direction suggested by JJ. Marshall and Brennan (Swindler v. Lockhart, 495 U.S. 911 (1990), Lee v. Georgia, 488 U.S. 879 (1988) denying cert.).

We think therefore, it is evident from history and precedents of this court that the community of the vicinage has a constitutionally protected right to participate in the judgement of civil or criminal offenses committed against that community.

B. Adjudication of civil offenses by local courts is necessary for the preservation of local self-government.

While the principle of trial by the vicinage primarily applies to criminal trials, the principle of community self-government which is ultimately at stake is the same whether a trial is criminal or civil. Moreover, this court has repeatedly held that jurisdiction over civil disputes is an integral part of sovereignty.

In 1959 (Williams v. Lee) reversing an Arizona decision saying that civil disputes between Indians and non-Indians should be resolved in state court rather than tribal court, a unanimous US Supreme Court declared

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took

> place there. Cf. Donnelly v. United States, supra; Williams v. United States, supra. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since.

The reasoning in Williams v. Lee applies equally well here. To deny the exercise of tribal jurisdiction in a suit between an Indian and a non-Indian over an action which occurred on tribal territory "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."

This Court has repeatedly upheld tribal civil jurisdiction over non-Indians. As recently as 1990 in Duro v. Reina (495 US 676) this Court declared:

> It is true that our decisions recognize broader retained tribal powers outside the criminal context. Tribal courts, for example, resolve civil disputes involving nonmembers, including non-Indians. See, e. g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 -66 (1978); Williams v. Lee, 358 U.S. 217, 223 (1959); F. Cohen, Handbook of Federal Indian Law 253 (1982 ed.) ("The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction"). Civil authority may also be present in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination. See, e. g., Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

It would seem to us that tribal court control over actions of officials performing searches at the sufferance of the tribal courts is another example of tribal authority which "is vital to the maintenance of tribal integrity and self-determination."

Duro went on to quote the 1975 decision in US v. Mazurie which declared, "The tribes are, to be sure, 'a good deal more than "private voluntary organizations,"' and are aptly described as 'unique aggregations possessing attributes of sovereignty over both their members and their territory.'" US v. Mazurie, 419 U.S. 544, 557 .

Even more recently in Strate v. A1 Contracting (1997), this Court noted that "Tribal authority over the activities of non-Indians on its reservation lands is an important part of tribal sovereignty" (520 US 438, 451).

Repeated decisions of this Court have made clear that jurisdiction over civil cases arising on tribal territory – regardless of whether or not the defendant is an Indian – is basic to the sovereignty that tribes exercise over their territory.

C. The claim of immunity for agents of the state violates the right of the community to participate in adjudication of local offenses.

Given the community's right to "participation" [*Williams*] in the legal process, does a claim of immunity for agents of the state in fact violate the right of the community to participate? We believe it does, at least with respect to confrontations between separate sovereignty (that is, between tribal, state and federal governments).

Application of the Sixth and Seventh Amendments to the States (via some form of incorporation doctrine of the Fourteenth Amendment) has long been problematic. Without attempting to define if and when parts of these amendments apply to States, we do not believe that a local community which is a political subdivision of a state would have any federal claim against the state for such violation of the vicinage principle. This Court's refusal to interfere in a State's location for trial seems proper.

However, the issue raised here involving a tribal government is very different from one involving a local government which is a subdivision of a state. Moreover, in the current case the

State is asking the federal courts to intervene to prevent a trial of the vicinage. If the federal courts were to deny jurisdiction to the tribal courts and thereby either prevent any trial, or move the trial into state court – rather than tribal courts – the result would be the same.

Since the purpose of the jury trial is twofold (to protect the accused and ensure community participation) intervention by the federal court to deny community participation would be no more justifiable than federal intervention to deny the right of the accused to a trial by jury. Nor do we think whether or not the community has in particular instances provided for trial by judge or by jury affects the basic principle of community participation (*Callan v Wilson* [127 U.S. 540, 553]). Even in cases tried before a judge, or are appealed to a higher level (as in the intertribal court) these mechanisms are adopted by the tribal community as its law. In short, community participation does not necessarily require trial by jury, but "community participation and shared responsibility" requires that the community has a substantial say in how civil and criminal offenses are adjudicated.

We believe that trial of government officials is even more important to be held in the vicinage than ordinary offenses against the community. As we have noted, a basic reason that the early Americans were so insistent on the vicinage rule, was that they saw it as a way to ensure that oppression could not be shielded by making officials unaccountable to the local community.

Certainly the anti-federalists who pushed for the Sixth and Seventh Amendments regarded civil suits against the government or government agents as a prime example of why trial by jury in civil suits was so important in the preservation of liberty.

Like the early proponents of the Bill of Rights, we do not think that the principle of trial of the vicinage and community participation applies less to civil trials, especially in cases where the civil suit alleges actions which may also involve criminal offenses.[3]

---

[3] If, indeed, tribal governments are prohibited from bringing criminal charges against non-Indians, then the ability for tribes to address wrongs in a civil proceeding becomes all the more important.

Obviously, in some civil actions there may be a variety of jurisdictions which might take original cognizance of a suit, but to forbid that the courts of the jurisdiction where an alleged action took place to take cognizance of a suit against an individual, strikes us as very nearly adopting a modern version of the intolerable acts.

D. Sovereign Immunity does not shield individual agents from suit

Coalition for Local Sovereignty has been one of the strongest supporters of a State's Eleventh Amendment guarantee that it cannot be sued in any court without its consent. We agree that a tribal court could not hold a state liable for damages (or at least, if it found a state owed damages such payment on the part of the state would be purely voluntary). Nor do we believe that an individual tribal member could sue a state in federal court for damages.

Nevertheless, we have in past briefs argued that there is a legitimate distinction to be made between actions of state agents as individuals and actions as state agents. As we argued earlier this term in our amicus brief for *Alabama v. Garrett*:

> There is no doubt that federal courts can have cognizance of some suits involving individuals who happen to be state officers, or which claims arise from activities of state employees on the job. A police officer who steals from an individual from out of state, could certainly be sued in federal court for damages, and he could not invoke immunity. Even an officer who murders a person on orders from the governor could be sued for wrongful death if the person killed were a citizen of another state. That principle is not in dispute, nor has ever been questioned. What the *Young* case ruled on was whether the suit against Young was one against him in his individual capacity or against the State.

We have argued that in the past federal courts have played fast and loose with this *ex parte Young* distinction arguing that states both are and are not defendants in the very same action. It strikes us that the State of Nevada is now playing the same game by both shielding its agents from prosecution while also refusing to accept responsibility for their actions.

Whatever problems have arisen from the *Young* decision (which treats States as the defendant for purposes of the Fourteenth Amendment, but individuals only as defendants for purposes of the Eleventh Amendment) this court has repeatedly ruled that individual State agents could be sued in federal court without violation of State sovereignty. (In re Ayers, 123 U.S. 443; State v. Jumel, 107 U.S. 711; Antoni v. Greenhow, 107 U.S. 769; Cunningham v. Railroad Co., 109 U.S. 446; Hagood v. Southern, 117 U.S. 52; Pennoyer v. McConnaughy, 140 U.S. 1.)

It is hard to imagine how tribal prosecution of individual state agents could be more violative of state sovereignty than similar prosecution by the federal government. After all, tribal governments, unlike the federal courts, presumably have no way to force a state to comply with any of its judgements. This being the reality, it is hard to imagine how tribal courts could possibly interfere with any action of States outside of the borders of the tribe's jurisdiction.

The only penalty a tribe could enforce would be to refuse to cooperate in the future issuance of warrants on the reservation. But a judgement that once a tribal court does issue a search warrant that any actions performed by state agents from that point forward can never be reviewed or punished by the tribal court, could well lead tribes to refuse to cooperate ever again. Such a judgement by this Court that state officials are above the law of the tribe could well do irreparable damage to cooperation between state and tribal governments.

Conclusion

As distinguished Harvard law Professor Mary Ann Glendon has pointed out (most notably in her book *Right Talk: The Impoverishment of Political Discourse*) American courts in recent years have tended to interpret constitutional rights "hyper-individualisticly" and to regard individuals alone as the bearers of rights. As a result, Glendon says, "The rights revolution has contributed in its own way to the atrophy of vital local governments" (*Rights Talk*, 5) because our legal discourse of rights fails to take into account the needs (or "rights") of neighborhoods and local communities.

This Court has declared "We must not forget that the community also has rights, and that the happiness and well-being of every citizen depends on their faithful preservation." (Charles River Bridge v. Warren Bridge, 1837).

We believe it would be wrong to consider the current dispute as simply a discussion of the "right" of one individual to sue another individual. It is at root a dispute between two communities. This Court in recent years has affirmed what are often termed (improperly in our view) "States' rights." The current case is an opportunity for this Court to re-affirm that neighborhoods also have constitutional and common law rights to self-government and participation in the adjudication of disputes which arise in their community.

To again quote Professor Amar:

> A modern commentator might protest that the respect for community rights underlying the vicinage rule comes only at a cost to the rights of criminal defendants. But the Massacre trial itself provides a powerful counter-argument –for, like the Diallo defendants, most of the Massacre defendants won complete acquittals, suggesting that they received a fair trial even in a community where passions against them ran high. ... How did we come to forget these Founding lessons? Part of the answer may be found some

> fourscore years after the American Revolution, when our Constitution was reconstructed in the shadow of the Civil War. The Revolution had pitted liberty-loving localists against an oppressive imperial center; and the local jury embodied all that patriots held dear.

This Court seems to have long ago reconciled itself to the fact that the reconstruction era is long over, and distrust for local communities which was enshrined in Warren Court decisions is past. Not to mention, of course, in the current case, tribal governments have little historical record of persecuting non-Indians (rather the oppression has gone the other way).

We believe that this case presents a perfect opportunity to affirm the right of local communities and tribal governments to self-government and self-determination.

For these reasons we urge that the ruling of the Intertribal Appeals Court and the US Court of Appeals be affirmed.

Respectfully Submitted,

Kenneth B. Clark, *Counsel of Record*
Coalition for Local Sovereignty
611 Pennsylvania Ave. SE #169
Washington, DC 20003
(301) 579 6100

January 16, 2001

JAN 19 2001

No. 99-1994

Supreme Court, U.S.
FILED
JAN 19 2001
CLERK

In The

Supreme Court of the United States

STATE OF NEVADA, ET AL.,

Petitioners,

v.

FLOYD HICKS, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE PYRAMID LAKE PAIUTE TRIBE OF NEVADA, THE WALKER RIVER PAIUTE TRIBE OF NEVADA, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, THE FORT MOJAVE INDIAN TRIBE, THE MASHANTUCKET PEQUOT TRIBE, AND THE MOHEGAN TRIBE OF CONNECTICUT IN SUPPORT OF RESPONDENTS

JOHN FREDERICKS III
Counsel of Record
FREDERICKS, PELCYGER & HESTER, LLC
1075 S. Boulder Rd., Suite 305
Louisville, Colorado 80027
(303) 673-9600

Counsel for Amici Curiae the Pyramid Lake Paiute Tribe of Nevada, the Walker River Tribe of Nevada, the Confederated Tribes of the Umatilla Indian Reservation, the Fort Mojave Indian Tribe, the Mashantucket Pequot Tribe, and the Mohegan Tribe of Connecticut

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE*..... 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT 3

I. THE INHERENT SOVEREIGNTY OF THE FALLON PAIUTE-SHOSHONE INDIAN TRIBE SUPPORTS THE EXERCISE OF TRIBAL COURT JURISDICTION OVER A CIVIL ACTION FILED BY A TRIBAL MEMBER WHICH ARISES ON RESERVATION TRUST LAND 3

A. The Doctrine Of Tribal Sovereignty Is Grounded In The Constitution And Laws Of The United States, Supported By History.. 4

B. Both Congress And The Executive Branch Recognize And Support The Territorial Sovereignty Of Indian Tribes In General And The Civil Jurisdiction Of Tribal Justice Systems In Particular 10

C. While There Are Federal Limitations On The Exercise Of Tribal Jurisdiction Over Non-Indians In Indian Country, Those Limitations Are Not Applicable Here 15

1. *Montana*'s Main Rule and Exceptions Are Not Applicable to Causes of Action Arising on Trust Land..... 19

2. The Court's Decision in *Strate* is Not Applicable to Civil Actions Brought By Tribal Members..... 20

3. This Court's Decision in *Oliphant v. Suquamish Indian Tribe* is Not Applicable to Questions of Civil Jurisdiction 23

TABLE OF CONTENTS – Continued

Page

4. The Court's Decision in *Williams v. Lee* is Not Limited to Actions Where Tribal Members Are Defendants 24

5. Indian Tribes Are Not Divested of Their Sovereignty Simply Because They Authorize Non-Indians to Enter Reservation Lands 26

II. THE QUESTION OF THE DEFENDANTS' IMMUNITY FROM SUIT SHOULD INITIALLY BE RESOLVED IN THE TRIBAL COURT..... 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Native Village of Venetie Tribal Government, et al., 522 U.S. 520 (1998) 11

Antoine v. Washington, 420 U.S. 94 (1975) 10

Boddie v. Connecticut, 401 U.S. 371 (1971) 22

Brendale v. Confederated Tribes and Bands of Yakima Indian Reservation, 492 U.S. 408 (1989)... 4, 19, 20, 21

Bryan v. Itasca County, 426 U.S. 373 (1976)..... 16

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 22

California, et al. v. Cabazon Band of Mission Indians, et al., 480 U.S. 202 (1987) 3

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 7, 9, 10

County of Yakima, et al. v. Confederated Tribes and Bands of the Yakama Indian Nation, 502 U.S. 251 (1992) 12

DeCouteau v. District Court, 420 U.S. 425 (1975)..... 11

Hafer v. Melo, 502 U.S. 21 (1991) 28

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987)...*passim*

Johnson v. McIntosh, 21 U.S. 543 (1823) 7

Lambert v. Ryozik, 886 P.2d 378 (Mont. 1994)..... 25

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 28

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 10

TABLE OF AUTHORITIES – Continued

Page

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 10, 16, 22, 26, 27

Montana v. United States, 450 U.S. 544 (1981) .... *passim*

National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985) 24, 28

Nevada v. Hall, 440 U.S. 410 (1979) 22

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 3, 12, 15, 21

Oliphant v. Suquamish Indian Tribe, 435 U.S. 119 (1978) 23, 24

Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) 25

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 3, 14, 16, 22

South Dakota v. Bourland, 508 U.S. 679 (1993) .. 4, 19, 20

Strate v. A-1 Contractors, et al., 520 U.S. 438 (1997) 4, 19, 20, 21, 23, 26

Talton v. Mayes, 163 U.S. 376 (1896) 3

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984) 25

Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986) 25

U.S. v. Mazurie, 419 U.S. 544 (1975) 3

United States v. Wheeler, 435 U.S. 313 (1978) 15

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 4, 12, 17, 18, 21, 24

TABLE OF AUTHORITIES – Continued

Page

Williams v. Lee, 358 U.S. 217 (1959) ..... *passim*

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 3, 7, 9, 10, 15

CONSTITUTION AND STATUTES

18 U.S.C. § 1151 ..... 10, 11

25 U.S.C. § 177 7

25 U.S.C. §§ 1321-1326 16

28 U.S.C. § 1360 16

American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701-3702 12

American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4021 12

Commerce Clause, U.S. Const. art. I, § 8, cl. 3 6

General Allotment Act of 1887, 25 U.S.C. §§ 331 *et seq*. 16, 19

Indian Civil Rights Act, 25 U.S.C. § 1302-1303 16

Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq*. 16

Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450, *et seq* 12

Indian Tribal Justice Act of 1993, 25 U.S.C. §§ 3601-3631 (1994) 12, 13, 22

Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. 106-559 ..... 11, 12, 14

Indian Tribal Self-Governance Amendments of 2000, Pub. L. 106-260, 14 Stat. 711 12

TABLE OF AUTHORITIES – Continued

Page

Native American Business Development, Trade Promotion, and Tourism Act of 2000, Pub. L. 106-464, 114 Stat. 2012 12

Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 12

Pub. L. 83-280, 18 U.S.C. § 1162 16

Treaty Clause, U.S. Const. art. II, § 2 cl. 2 6

Treaty with the Wyandots, Delawares, Shawanoese, Senecas and Miamies, July 22, 1814, 7 Stat. 118 6

OTHER

7 U.S. Op. Att'y Gen. 174 (1855) 24

A. Bothwell, We Live On Their Land: Implications of Long Ago Takings of Native American Indian Property, 6 Ann. Surv. Int'l & Comp. L. 175 (2000) 6

Barbara Graymont, The Iroquois in the American Revolution (1972) 5

Cohen, The Spanish Origin of Indian Rights in the Law of the United States, 31 Geo. L.J. 17 (1942) 5

Exec. Order No. 13084, 63 Fed. Reg. 27655 (1998) 12

Exec. Order No. 13175, November 6, 2000, 65 Fed. Reg. 67249 12

F. Cohen, Handbook of Federal Indian Law (1982 ed.) 8

Francis Paul Prucha, American Indian Treaties, (1994) 6

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 205, 103rd Cong., 1st Session at pp. 8-9 (1993) 14

S. Rep. No. 88, 103rd Cong., 1st Session 8 (1993) 14

Vine Deloria, Jr., Behind the Trail of Broken Treaties, (1974) 5

INTEREST OF THE *AMICI CURIAE*[1]

The *Amici Curiae* are all federally recognized Indian tribes with established tribal justice systems which provide reservation residents a forum to adjudicate civil actions involving both Indians and non-Indians. *Amici* have a significant interest in this case, because it involves a challenge to tribal court jurisdiction over a civil action filed by a tribal member against a nonmember and arising Indian trust land. *Amici* are concerned with protecting their territorial sovereignty by protecting the jurisdiction of the tribal courts which derive from that sovereignty.

SUMMARY OF ARGUMENT

The Fallon Paiute-Shoshone Tribal Court has jurisdiction over civil actions filed by tribal members against nonmembers when the action arises within the boundaries of the reservation. This jurisdiction is supported both by this Court's precedent and the laws and policies of Congress and the Executive branch. The Tribal Court's jurisdiction in civil matters involving tribal members has not been divested by Congress. Moreover, the exercise of jurisdiction is not consistent with the Tribe's dependent status because it is not inconsistent with the overriding interests of the federal government. By enacting laws,

---

[1] Pursuant to Sup. Ct. R. 37.3, *Amici* submit this Brief *Amicus Curiae* with the consent of all parties. The consents are submitted for filing herewith. Pursuant to Sup. Ct. R. 37.6, counsel for *Amici* state that no counsel for a party authored this Brief in whole or in part.

such as the Indian Tribal Justice Act and the Indian Tribal Justice Technical and Legal Assistance Act of 2000, Congress has expressed its view that tribal court jurisdiction derives from the inherent authority of Indian Tribes to establish their own form of government and tribal courts are essential to its maintenance, and that the civil jurisdiction of tribal courts extends to actions arising on their reservation. This Court's precedent also supports the *Amici* position. This Court has recognized that tribal courts play a vital role in tribal self-government and their civil jurisdiction extends to disputes between tribal members and non-Indians. This Court has also enunciated two principles which should control in this case: tribes presumptively have authority over non-Indians for actions occurring on Indian trust lands unless expressly limited by treaty or statute and that tribal courts, not federal courts, should initially determine the scope and existence of tribal court jurisdiction in actions arising on the reservation.

As *Amici* demonstrate in this Brief, validation of the State's position will undermine congressional goals and require the reversal of controlling Supreme Court precedent. *Amici* believe that tribal sovereignty is not a mere legal abstraction. Rather, sovereignty is the very real and critical ability of an Indian tribe to make and enforce applicable laws in situations similar to those in the present case and in a manner parallel to that of other governments. *Amici* urge the Court to adhere to the laws and policies of Congress and its own precedent by upholding the jurisdiction of the Tribal Court.

ARGUMENT

I. THE INHERENT SOVEREIGNTY OF THE FALLON PAIUTE-SHOSHONE INDIAN TRIBE SUPPORTS THE EXERCISE OF TRIBAL COURT JURISDICTION OVER A CIVIL ACTION FILED BY A TRIBAL MEMBER WHICH ARISES ON RESERVATION TRUST LAND.

Since the formative years of this Nation's existence, this Court has acknowledged that Indian tribes are governments who possess sovereignty over their territory as well as their members. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832); *Williams v. Lee*, 358 U.S. 217, 222-23 (1959); *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (*Mescalero Apache*); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *California, et al. v. Cabazon Band of Mission Indians, et al.*, 480 U.S. 202, 206 (1987). This sovereignty is inherent, it is not delegated to tribes by Congress. It exists by virtue of the United States' historical recognition of Indian tribes as independent political entities, whose existence as such predates this nation's existence. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *Talton v. Mayes*, 163 U.S. 376, 383-84 (1896).

The jurisdiction of tribes to regulate and control the activities of non-Indians on reservation land is an important part of the Tribe's territorial sovereignty, and is supported by Congress:

> We have stressed that Congress's objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress's overriding goal of encouraging tribal

> self-sufficiency and economic development. In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of their territory and resources by both members and nonmembers.

Mescalero Apache, 462 U.S. at 335; *accord*, *Williams*, 358 U.S. at 223.

This authority includes a "broad measure of civil jurisdiction over the activities of non-Indians on reservation lands in which the tribes have a significant interest." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980). Jurisdiction over such matters "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18. Although this Court has limited the exercise of tribal civil jurisdiction over the conduct of non-Indians on reservation land which has been alienated in fee to non-Indians, *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of Yakima Indian Reservation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Strate v. A-1 Contractors, et al.*, 520 U.S. 438 (1997), the rulings in those cases do not apply for the reasons discussed below.

A. The Doctrine Of Tribal Sovereignty Is Grounded In The Constitution And Laws Of The United States, Supported By History.

Despite Petitioner's argument to the contrary (Pet. brief, 14-16) the Constitution recognizes the existence of

Indian tribes as sovereign governments, and this recognition is grounded in both history and the law of nations. *See* Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 17 (1942) ("In the first place, we must recognize that our Indian law originated, and can still be most clearly grasped, as a branch of international law. . . . "). Moreover, this territorial sovereignty is supported by a history of Indian treaties and statutes passed by Congress. The constitutional basis of the Indian sovereignty doctrine must be analyzed in this context.

Prior to the Revolutionary War, there were a number of Indian tribes in what is now the eastern United States who possessed sizable military strength, and the founding fathers were well aware of the existence of powerful Indian tribes to the north, south and west of the original colonies. During the war both the European governments and the colonists sought neighboring tribes as allies in their struggle for control of the New World. The colonists knew that the military support from the strong eastern tribes would undoubtedly influence the fighting. *See* Barbara Graymont, *The Iroquois in the American Revolution* 66 (1972). Thus, many of the early Indian treaties were treaties of peace and friendship with the tribes whereby the colonists sought the aid of the tribes against the British. The early Indian treaties were born of the need of the colonists to have the more powerful tribes as their allies and not just as a mechanism to acquire lawful title to the Indians' land. *Id.*; F. Cohen, *Handbook of Federal Indian Law* 55, 58-62 (1982 ed.); *see* Vine Deloria, Jr., *Behind the Trail of Broken Treaties*, 118-120 (1974) (discussing the 1778 treaty between the Delaware Indians and the United

States). The competition for tribes as allies continued through the War of 1812 with Britain. *See, e.g.*, Treaty with the Wyandots, Delawares, Shawanoese, Senecas and Miamies, July 22, 1814, 7 Stat. 118. It also resulted in a series of treaties with the Cherokee and other tribes in the south who, together with Spain still constituted a sizable military threat. Francis Paul Prucha, *American Indian Treaties* 59 (1994).

It is against this historical background that the Treaty Clause and Commerce Clause of the Constitution must be read. Indian tribes find express constitutional recognition in the Commerce Clause which gives Congress the power to "regulate commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. Placed in historical context, it is no mere coincidence that the Commerce Clause of the Constitution places Indian tribes alongside foreign nations and state governments within the constitutional framework. Tribal sovereignty also finds implicit recognition in the Treaty Clause of the Constitution which gives the President the power to make treaties with the advice and consent of the Senate. *Id.* at art. II, § 2 cl. 2. At the time the Constitution was made, it was common practice for the colonists, and later the United States to execute treaties with the Indian tribes, so it is not hard to conclude that the framers of the Constitution had Indian tribes in mind when the Treaty Clause was drafted. *See* A. Bothwell, *We Live On Their Land: Implications of Long Ago Takings of Native American Indian Property*, 6 Ann. Surv. Int'l & Comp. L. 175, 177-181 (2000).

The early treaties and the Indian treaties and laws that followed the settlement of the West embodied the

notion that the tribes possessed original sovereignty and had a prior legal claim to the land they occupied, *Johnson v. McIntosh*, 21 U.S. 543, 544 (1823), a claim that could only be extinguished by Congress. 25 U.S.C. § 177. This concept of territorial sovereignty was incorporated by this Court into United States law in a series of early cases involving the Cherokee Nation, and these cases established the foundation upon which the doctrine of tribal sovereignty and the government-to-government relationship between the United States and Indian tribes is based.

In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Cherokee Nation sought an injunction to prevent the state of Georgia from enforcing its laws and trespassing upon the territory reserved to the Cherokee by treaty. The Cherokee argued that their treaties with the United States were an express recognition of their territorial sovereignty. *Id.* at 4. In addition, the Cherokee asserted the supremacy of federal treaties over state law under the Constitution's Supremacy Clause. The Court, in an opinion by Chief Justice John Marshall agreed. "The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts." *Id.* at 16. In a concurring opinion, Justices Thompson and Story concluded that the Cherokee was a "sovereign independent nation or foreign state," and this applied to all other tribes as well. 30 U.S. at 32.

One year later, this Court held that Georgia had no jurisdiction to prosecute non-Indians doing missionary work in Cherokee Territory. *Worcester*, 31 U.S. at 556-57. The Court found that the tribes had signed treaties and been treated as sovereigns by the European nations, and

the United States had continued this relationship of alliances through treaties, "which itself evidenced a constitutional acknowledgment of the Tribes' sovereign status." Cohen, *Handbook of Federal Indian Law* 234. The Court stated:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial. . . . The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

31 U.S. at 559.

The Court then rejected Georgia's argument that the Cherokee Nation had somehow given up its sovereignty by agreeing to a treaty in which the Cherokee agreed to peace and accepted the care and protection of the United States.

> The settled doctrine of the law of nations is that a weaker power does not surrender its independence – its right to self-government, by

> associating with a stronger and taking its protection. A weak State in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State.
>
> * * *
>
> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which, the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States.

31 U.S. at 560-561.

Worcester established that the state had no authority to regulate activities within the territory reserved to the tribe unless Congress, pursuant to the exercise of its own authority under the Commerce Clause, expressly authorized state jurisdiction. 31 U.S. (6 Pet.) at 561-562. Together, *Cherokee Nation* and *Worcester* stand for the proposition that there exists, within the constitutional framework, a unique government-to-government relationship between the United States and Indian tribes. The relationship is one of trust, grounded in treaties, the laws of Congress, the Indian Commerce Clause, under which the tribes within their territory generally govern free of state interference subject only to the power of Congress to limit their authority. The Cherokee cases are the legal

foundation upon which tribal sovereignty is based, a foundation which is supported by history as well as the Constitution. The Court should reject the Petitioner's argument that tribal sovereignty cannot co-exist with the sovereignty of the federal and state governments. That is simply not the law.

B. Both Congress And The Executive Branch Recognize And Support The Territorial Sovereignty Of Indian Tribes In General And The Civil Jurisdiction Of Tribal Justice Systems In Particular.

The principles of self-government which underlie the decisions in *Cherokee Nation* and *Worcester* find express historic recognition in the laws of Congress and policies of the Executive Branch, and they remain embodied in the current federal policy which supports tribal self-determination. Although formal treaty-making came to an end in 1871, both Congress and the Executive Branch continued to establish reservations for tribes by agreements, statutes and Executive Orders. This Court has acknowledged that these treaty substitutes carry the same weight and legal effect as a treaty. *Antoine v. Washington*, 420 U.S. 94, 200-04 (1975); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 n.1 (1982). Implicit in these laws establishing Indian reservations is the notion that they are set aside "within the exclusive sovereignty of the Tribe under general federal supervision." *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 175 (1973); *Williams*, 358 U.S. at 222-23. Congress codified this notion in 1948 when it adopted the general definition of Indian Country, 18 U.S.C. § 1151, within which jurisdiction primarily rests

with the federal and tribal government. *Alaska v. Native Village of Venetie Tribal Government, et al.*, 522 U.S. 520, 527 n.1 (1998); *DeCouteau v. District Court*, 420 U.S. 425, 427 (1975). Congress just recently reaffirmed this proposition in § 4(2) of the Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. 106-559, which defines the term "Indian lands" as "lands within the definition of 'Indian Country', as defined in [18 U.S.C. § 1151]."

Today both Congress and the Executive Branch remain firmly committed to promoting and protecting tribal sovereignty and self-government, including promoting tribal courts. The President's recent Executive Order of May 14, 1998 declares the commitment to tribal sovereignty, a commitment based upon the historic government-to-government relationship which has existed between the United States and Indian tribes:

> The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.

Exec. Order No. 13084, 63 Fed. Reg. 27655 (1998); *accord*, Exec. Order No. 13175, November 6, 2000, 65 Fed. Reg. 67249.

Since the passag of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450, *et seq.*, Congress has consistently reaffirmed its recognition and support of tribal self-government. e.g., *Mescalero Apache*, 464 U.S. at 334-35 n.17; *Iowa Mutual*, 480 U.S. at 14-15 nn.5 & 6.[2] In deference to the authority of Congress in matters of tribal jurisdiction, this Court's decisions have "followed Congress' lead in this area." *County of Yakima, et al. v. Confederated Tribes and Bands of the Yakama Indian Nation*, 502 U.S. 251, 261 (1992); *Colville*, 447 U.S. at 152-53; *Merrion*, 455 U.S. at 149-52.

Perhaps the strongest recent signal from Congress in support of tribal sovereignty comes in the Indian Tribal Justice Act of 1993, 25 U.S.C. §§ 3601-3631, and the Indian Tribal Justice Technical and Legal Assistance Act of 2000, *supra*. The 1993 Act rests upon congressional findings expressly reaffirming the importance of tribal sovereignty and the role of tribal courts in promoting and preserving tribal sovereignty:

---

[2] More recent examples of congressional acts in this area are §§ 2-3 of the Indian Tribal Self-Governance Amendments of 2000, Pub. L. 106-260 14 Stat. 711; the Native American Business Development, Trade Promotion, and Tourism Act of 2000, Pub. L. 106-464, 114 Stat. 2012; the American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701-3702; the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4021; and the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101.

> The Congress finds and declares that –
>
> (1) there is a government-to-government relationship between the United States and each Indian tribe;
>
> (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;
>
> (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;
>
> (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
>
> (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;
>
> (6) Congress and the federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights.

25 U.S.C. §§ 3601(1)-(6).

The legislative history of the Indian Tribal Justice Act clarified Congress' intent to reaffirm tribal court jurisdiction over disputes between tribal members and nonmembers on reservation land:

> [25 U.S.C. § 3601(6)] was added to emphasize that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals. The

> language tracks similar language of the Supreme Court in its ruling in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, (1978), in which the Court stated that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important and personal property interests of both Indians and non-Indians."

S. REP. NO. 88, 103RD CONG., 1st Session 8 (1993).

In addition, the House Report clarified Congress' understanding that Indian tribal courts retain the right to exercise civil jurisdiction within their territory, including jurisdiction over the activities of non-Indians on reservation land in which the tribes have a significant interest. "Hence, non-Indians may be sued in tribal court." H.R. Rep. No. 205, 103rd Cong., 1st Session at pp. 8-9 (1993). The subsequent 2000 Act itself speaks of tribal jurisdiction over "Indian lands," which are defined to include all lands within the boundaries of an existing reservation. Pub. L. 106-559, §§ 2(2) and 4(2), 114 Stat. 2778, 2779 (2000).

It is against these statements of congressional support for tribal self-government in general and tribal court jurisdiction in particular that this Court must determine the issue of tribal court jurisdiction over Floyd Hicks' cause of action. As shown below, federal law has not divested the tribal court of its subject matter jurisdiction in this case.

C. While There Are Federal Limitations On The Exercise Of Tribal Jurisdiction Over Non-Indians In Indian Country, Those Limitations Are Not Applicable Here.

When Chief Justice Marshall wrote the *Worcester* decision he defined the nature and limits of tribal territorial sovereignty with an easy straightforward approach, one which deferred to the power of Congress to diminish Indian sovereignty. The Court held simply that the Cherokee Nation was a separate political entity with a territory whose borders were defined by federal law and within which state authority could not apply absent the express consent of Congress, pursuant to its delegated authority to regulate Indian commerce under the Commerce Clause. 31 U.S. at 551-60. Admittedly, this Court has departed from the conceptual clarity of *Worcester*. *Mescalero Apache Tribe*, 462 U.S. at 331. Although today tribes still possess sovereign authority over both their members and their territory, their territorial sovereignty is no longer considered absolute. Rather, it is described as having "a unique and limited character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). As a general rule, however, Indian tribes today still possess those aspects of their inherent sovereignty which are not expressly withdrawn by treaty or statute, or by "implication" as a necessary result of their dependent status. *Wheeler*, 435 U.S. at 323.

The Petitioner can point to no act of Congress which has diminished the civil jurisdiction of the Fallon Paiute-Shoshone Tribe or its tribal court, and indeed no such act

exists.[3] On the contrary, as shown previously, the relevant statutes passed by Congress reflect a policy which supports tribal court jurisdiction.

The question then, is whether the exercise of tribal jurisdiction over civil actions arising on reservation trust land, brought by tribal members against non-Indians, is inconsistent with the dependent status of the tribes within the meaning of *Wheeler* and this Court's subsequent cases on the subject. In addressing this question, this Court has admonished that it may not lightly imply a judicial divestiture of tribal authority:

> a proper respect both for tribal sovereignty itself, and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.

Merrion, 455 U.S. at 1495, quoting *Santa Clara*, 436 U.S. at 60.

The exercise of jurisdiction by the tribal court over Hicks' cause of action is not inconsistent with the tribe's

---

[3] When Congress wishes to limit tribal jurisdiction it knows how to do so expressly. *See, e.g.*, General Allotment Act of 1887, 25 U.S.C. §§ 331 *et seq.*; Pub. L. 83-280, 18 U.S.C. § 1162, and 28 U.S.C. § 1360, as amended, 25 U.S.C. §§ 1321-1326; the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302-1303; the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* When Congress does decide to place limitations on the exercise of tribal authority, it is careful to draw those limitations narrowly. *See Santa Clara*, 436 U.S. at 62-66 (discussing the effect of the Indian Civil Rights Act); *Bryan v. Itasca County*, 426 U.S. 373, 388-91 (1976) (discussing Pub. L. 280); 25 U.S.C. §§ 2701-2702 (setting forth dual goals of federal regulation of Indian gaming and preservation of tribal self-government).

dependent status. In cases which involve the exercise of tribal civil jurisdiction over non-Indians on trust land, this Court has found implicit divestiture only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." *Colville*, 447 U.S. at 153. The Petitioners have not shown how or why tribal court jurisdiction over civil actions involving tribal members is inconsistent with any overriding federal interest. On the contrary, federal policy supports tribal jurisdiction in such cases, as does this Court's precedents. *See, e.g., Montana*, 450 U.S. at 557 (recognizing broad authority to regulate and even prohibit non-Indians from hunting or fishing on Indian trust land); *Iowa Mutual*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute").

It is true that this Court in *Montana* said that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes and so cannot survive without express congressional delegation." 450 U.S. at 564 (citations omitted). But that statement must be put in the context in which *Montana* was presented to the Court, and it must be applied consistently with this Court's other precedents. In particular, one of the cases cited in *Montana* to support the above-quoted statement was *Williams v. Lee, supra*, and it is that case which governs the analysis of tribal court jurisdiction here.

The Court in *Williams* held that Arizona courts lacked jurisdiction to adjudicate a civil dispute between a tribal member and a non-Indian merchant which arose on the Navajo Reservation. In upholding the territorial jurisdiction of the Tribe, the Court stated that when the Navajo Reservation was set aside by the United States it was with "the understanding that the *internal affairs* of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams*, 358 U.S. at 221-22 (emphasis added). The Court then stated:

> [T]o allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that [the merchant] is not an Indian. He was on the reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the treaty of 1868, and has done so ever since. If this power is to be taken from them, it is for Congress to do it.

358 U.S. at 223 (emphasis added).

The significance of the Court's decision in *Williams* was the recognition that the "internal affairs" of an Indian tribe can involve non-Indians when the conduct of non-Indians has an effect on the tribe or its members. In such cases, tribal jurisdiction remains intact. *Accord, Colville*, 447 U.S. at 153; *Iowa Mutual*, 480 U.S. at 18.

1. Montana's Main Rule and Exceptions Are Not Applicable to Causes of Action Arising on Trust Land.

The Petitioner's reliance on *Montana, Brendale, Bourland* and *Strate* to support the argument that the Fallon Tribal Court lacks jurisdiction is misplaced for a number of reasons. First and most important, all of those cases involved a tribe's assertion of jurisdiction on alienated fee land, *Montana*, 450 U.S. at 557; *Brendale*, 492 U.S. at 414; *Bourland*, 508 U.S. at 681, or on a public highway owned and regulated by the state, which the Court equated with fee land. *Strate*, 520 U.S. at 454. By contrast, the case at bar arose on Indian trust land within the boundaries of the reservation. As stated above, this Court recognizes that tribal authority over the conduct of non-Indians on trust land remains broad and exclusive, 450 U.S. at 557; *Strate*, 520 U.S. at 454, and that tribal courts presumptively have jurisdiction in such cases. *Iowa Mutual*, 480 U.S. at 18.

Second, underlying the decisions in *Montana, Brendale* and *Bourland* were congressional acts which supported the Court's decision that tribal jurisdiction had been limited. Both *Montana* and *Brendale* involved former allotted lands alienated in fee to non-Indians under the General Allotment Act, 25 U.S.C. §§ 331 *et seq.*, an "avowed purpose" of which "was the ultimate destruction of tribal government." *Montana*, 450 U.S. at 559 n.9; *see Brendale*, 492 U.S. at 422-24. The Court's subsequent decision in *Bourland* was also supported by legislation under which Congress had clearly expressed its intent to diminish tribal jurisdiction over former reservation lands taken by the statutes in question. 508 U.S. at 689-94. No

such Act of Congress supports the Petitioner's argument that the Fallon Paiute-Shoshone Tribal Court lacks jurisdiction here.

2. The Court's Decision in Strate is Not Applicable to Civil Actions Brought By Tribal Members.

Admittedly, unlike *Montana*, *Brendale* and *Bourland*, there was no federal statute in *Strate* that supported a limitation on tribal court jurisdiction. The Court focused instead on its own holding in *Montana*. Nevertheless, the decision in *Strate* is not inconsistent with *Williams*, *supra*. No tribal member was a party in *Strate*, the tort action involved two non-Indians. 520 U.S. at 444 n.3. As such the Court in *Strate* emphasized that the dispute was "distinctly nontribal in nature. It arose between two non-Indians involved in a run-of-the-mill highway accident . . . and the Tribes were strangers to the accident." 520 U.S. at 457. There was thus no tribal interest sufficient to support tribal court jurisdiction in *Strate*. The Court acknowledged, however, citing *Williams*, that tribal courts could assert jurisdiction, even on alienated fee land, in those cases where there is "a significant tribal interest at stake." 520 U.S. at 458.

Unlike *Strate*, the dispute in the case at bar is tribal in nature because it involves a tribal member's complaint against a non-Indian, who was on the reservation with the conditional consent of the tribal court, and whose conduct on the reservation it is alleged, violated the law and the terms of that consent and resulted in injury to a

tribal member's property. Such an action clearly falls within the jurisdiction of the tribal court under *Williams v. Lee*.

Properly understood, *Montana* and *Strate* stand for the proposition that, with respect to conduct on fee lands, there must be some relationship, connection, or nexus between the reservation-based activities of non-Indians and a significant Indian interest in order for those non-Indian activities to be subject to tribal jurisdiction. In the vernacular of *Williams* itself, both *Strate* and *Montana* fit into the category of cases "where essential tribal relations were not involved and . . . where the rights of Indians would not be jeopardized," and therefore the state action did not "infringe on the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 219-20; *see also Colville, supra*, 447 U.S. at 152-53 ("Included in this [retained] tribal [sovereign] power is a broad measure of civil jurisdiction over the activities of non-Indians on Indian Reservation lands *in which the tribes have a significant interest.*" (emphasis added)). Indeed, that is precisely how *Montana* was construed by a unanimous Court in *Mescalero Apache*, 462 U.S. at 330-31 and n.12; *see Brendale*, 492 U.S. at 443 (distinguishing *Montana* in part on the ground that the non-Indian conduct at issue there "posed no threat to the welfare of the Tribe").

Viewed in the light shed by this Court's other Indian law opinions, there should be no doubt that neither *Strate* nor *Montana* forecloses the jurisdiction of the tribal court over reservation-based claims asserted by tribal members, even on non-Indian land. This Court has recognized

that "[t]ribal courts play a vital role in tribal self-government and the federal government has consistently encouraged their development." *Iowa Mutual*, 480 U.S. at 14-15. One of the hallmarks of any organized and cohesive society is a system for resolving disputes in an orderly and predictable manner. "Without such a 'legal system', social organization and cohesion are virtually impossible. . . . " *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). The power to establish a mechanism or system for the resolution of civil disputes arising within the territory of a sovereign and affecting its members unquestionably is an essential and inherent attribute of Indian sovereignty "because it is a necessary instrument of self-government and territorial management." *Merrion*, 455 U.S. at 137; *Iowa Mutual*, 480 U.S. at 14-15, 18-19; *Santa Clara*, 436 U.S. at 59-60, 65. Such a mechanism is at the core of a tribe's "political integrity." *Montana*, 450 U.S. at 566. Congress recognized this in both the Indian Tribal Justice Act, 25 U.S.C. § 3601 and in the Indian Tribal Justice Technical and Legal Assistance Act of 2000. The tribes' political and governmental interest in establishing a tribal court system for reservation based disputes involving its members is no less significant than the states. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (state has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors); *Nevada v. Hall*, 440 U.S. 410, 424 (1979) (emphasizing a state's substantial interest in providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents).

In this case then, there are vital ties between essential tribal interests and the tribal court's jurisdiction over

Floyd Hicks' tort claims. Most important, unlike *Strate*, Hicks is a resident tribal member. Both the political integrity and health and welfare of the Tribe are directly affected in this case since an injury to a resident tribal member directly implicates the Tribe's important governmental interest in providing a forum to allow tribal members to seek redress. To require tribal members to submit their claims to a forum other than the one they have chosen for themselves most assuredly infringes on their right to make and be governed by their own laws within the meaning of the above-quoted passage of *Williams*. Nothing in *Strate* is inconsistent with these principles.

3. This Court's Decision in *Oliphant v. Suquamish Indian Tribe* is Not Applicable to Questions of Civil Jurisdiction.

The Petitioner's reliance on *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 119 (1978), is also misplaced. That case held that the Suquamish Tribe could not assert criminal jurisdiction over non-Indians on reservation lands, but it was based upon reasoning that is not applicable to questions of civil jurisdiction:

> For several reasons . . . the reasoning of *Oliphant* does not apply to [civil cases]. First, although Congress's decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation. Moreover, the opinion of one Attorney General on which we

> relied in *Oliphant*, specifically noted the difference between civil and criminal jurisdiction.

National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845, 854 (1985) *citing* 7 U.S. Op. Att'y Gen. 174 (1855); *accord, Colville*, 447 U.S. at 153 (questions of tribal jurisdiction to tax non-Indians on the reservation "differ sharply" from *Oliphant*, "in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians").

In the area of civil jurisdiction over reservation-based disputes between tribal members and non-Indians, the rule of *Williams* still applies, and it has not been overruled or limited by *Oliphant*, or any subsequent decisions of this Court.

4. The Court's Decision in Williams v. Lee is Not Limited to Actions Where Tribal Members Are Defendants.

The Petitioner's attempt to distinguish *Williams* based upon the alignment of the parties (Pet. brief, 19-20) is not supported by law or reason and would lead to absurd results. Although *Williams* upheld tribal court jurisdiction over a reservation action in which a non-Indian plaintiff sued a tribal member defendant, that case also supports the exercise of *concurrent* tribal and state jurisdiction in those cases where the parties are reversed, i.e., where a tribal member plaintiff sues a non-Indian defendant for a cause of action arising on the reservation.

The Tribe has a significant interest at stake, and the rights of the tribal member are implicated in either circumstance.

The point in *Williams* was that the tribal court had jurisdiction over the *subject matter* of the dispute. Obviously, the tribal member in *Williams* could have sued the non-Indian for events arising out of the same transaction (e.g., for breach of warranty arising from the same sale of goods) because the non-Indian "was on the reservation and the transaction took place there." 358 U.S. at 223. The premise of Petitioner's "sword" and "shield" argument is based upon a misunderstanding of the concept of exclusive versus concurrent state and tribal court jurisdiction. State court jurisdiction is not exclusive simply because the tribal member has the option to invoke it. *See Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 148-49 (1984); *see also Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 888-90 (1986). Although there may not be a threat to tribal self-government when "Indian plaintiffs choose to invoke the jurisdiction of" state courts, *Lambert v. Ryozik*, 886 P.2d 378, 380 (Mont. 1994), there is a direct threat to tribal sovereignty and an infringement on the right of tribal members to utilize tribal forums when Indian plaintiffs are forced to seek redress in state courts, and when they are deprived of the right to invoke the forums the tribe has provided. It makes no sense to suggest that state court jurisdiction becomes exclusive simply because Indian people have the right to invoke it. No case or act of Congress supports such a proposition. *See Sanders v. Robinson*, 864 F.2d 630, 634 n.4 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) (rejecting the same argument Petitioner makes here).

5. Indian Tribes Are Not Divested of Their Sovereignty Simply Because They Authorize Non-Indians to Enter Reservation Lands.

Montana and *Strate* do not support the argument that tribal jurisdiction is divested in cases involving tribal members simply because the tribe authorizes a nonmember to enter reservation land, or gives up its "gatekeeping" right. (See Pet. brief, p.44). In *Merrion*, the Court specifically rejected the notion that tribal sovereignty is derived solely from the tribe's right to exclude non-Indians from tribal lands. *Merrion* clarified that the mere fact that a tribe grants a non-Indian a license to enter tribal land does not mean that the tribe thereby gives up its jurisdiction. This is true whether that jurisdiction is based on general principles of sovereignty or on the tribe's power, as a landowner, to exclude non-Indians from reservation lands:

> Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, ... When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation.

Merrion, 455 U.S. 144-45 (footnote omitted)(emphasis original).

The Court then rejected the argument that the tribe gave up its sovereign power by not reserving it in its lease with the non-Indian. Citing the longstanding proposition that Indian tribes have the rights of both landowner and sovereign, "dominion as well as sovereignty," 455 U.S. at 145 n.12, the Court held that the fact that the tribe, in its capacity as a landowner, had sold the "right to use the land" did not mean that the tribe had waived its sovereign power to regulate non-Indians on those lands. "Confusing these two results denigrates Indian sovereignty." *Id.* at 146. At the heart of the Court's ruling is the notion that tribal sovereignty encompasses much more than a landowner's right to exclude:

> To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head, and we do not adopt this analysis.

Id. at 148.

These principles apply with equal force in the case at bar.

II. THE QUESTION OF THE DEFENDANTS' IMMUNITY FROM SUIT SHOULD INITIALLY BE RESOLVED IN THE TRIBAL COURT.

With respect to the question of the state's immunity from suit, it does not appear that the tribal courts or the Ninth Circuit dispute the notion that the state's sovereign immunity bars a suit in tribal court against the state and

its officials who act within the scope of their authority. Neither the Tribe nor the court below asserted that the Tribe can waive the sovereign immunity of the state. Instead, the question is whether the Nevada game wardens who were defendants in the tribal court suit acted outside the scope of their authority as state officers and thus were no longer clothed with the immunity of the state. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686-90 (1949). In such a case the defendants are subject to the jurisdiction of the court just like any other individual.

Although the defendants can assert qualified immunity as a defense even when sued individually, the defense is not jurisdictional, it is a personal affirmative defense. *Hafer v. Melo*, 502 U.S. 21, 28 (1991). Moreover, to the extent that the immunity defenses are based on federal law and to the extent they affect the jursidiction of the tribal court over a defendant's person, then they can be reviewable in federal court. *National Farmers*, 471 U.S. at 856. However, the Tribal Court should be given the first opportunity to take evidence and rule on these defenses, under the principles discussed in *National Farmers*, 471 U.S. at 856-57, and *Iowa Mutual, supra*, 480 U.S. at 14-17. *Amici* submit that the Ninth Circuit's ruling is this regard was correct.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be affirmed.

Respectfully submitted,

JOHN FREDERICKS III
Counsel of Record
FREDERICKS, PELCYGER
& HESTER, LLC
1075 S. Boulder Rd., Suite 305
Louisville, Colorado 80027
(303) 673-9600

Counsel for Amici Tribes